

## 52 Am. Jur. 2d Lost and Destroyed Instruments Summary

American Jurisprudence, Second Edition | May 2021 Update

### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

### [Correlation Table](#)

## Summary

### Scope:

This article discusses the law relating to lost or destroyed written instruments and public records. Included are discussions of the effect of such loss or destruction; proceedings to reexecute, reestablish, or restore such instruments or records; and the enforcement of the underlying rights evidenced by the lost or destroyed instruments. The article also addresses federal statutes on lost or destroyed records of a United States court or matter.

### Treated Elsewhere:

Abandoned, lost, and unclaimed property, rights of finders and owners, see [Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property §§ 1 et seq.](#)

Best and secondary evidence, see [Am. Jur. 2d, Evidence §§ 1062 to 1103](#)

Bills and notes, enforcement of lost or missing, see [Am. Jur. 2d, Bills and Notes §§ 279 to 287](#)

Checks, enforcement of lost or missing, see [Am. Jur. 2d, Bills and Notes §§ 283 to 287](#)

Citizenship documents, replacement for lost, mutilated, or destroyed documents, see [Am. Jur. 2d, Aliens and Citizens § 2574](#)

Equity, generally, see [Am. Jur. 2d, Equity §§ 1 et seq.](#)

Parol evidence, generally, see [Am. Jur. 2d, Evidence §§ 1104 to 1156](#)

Securities, lost, destroyed, or stolen, registration of, see [Am. Jur. 2d, Commercial Code § 117](#)

Warehouse receipts, remedy for lost, stolen, or destroyed receipts, see [Am. Jur. 2d, Warehouses § 132](#)

Wills, enforcement in probate of lost or destroyed wills, see [Am. Jur. 2d, Wills §§ 934 to 953](#)

<b>Research References:</b>
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**Westlaw Databases**

[American Law Reports \(ALR\)](#)

[West's A.L.R. Digest \(ALRDIGEST\)](#)

[American Jurisprudence 2d \(AMJUR\)](#)

[American Jurisprudence Legal Forms 2d \(AMJUR-LF\)](#)

[American Jurisprudence Proof of Facts \(AMJUR-POF\)](#)

[American Jurisprudence Pleading and Practice Forms Annotated \(AMJUR-PP\)](#)

[United States Code Annotated \(USCA\)](#)

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## 52 Am. Jur. 2d Lost and Destroyed Instruments I Refs.

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### Lost and Destroyed Instruments

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#### I. Nature and Effect of Lost or Destroyed Instruments

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  1 to 3

West's Key Number Digest, [Records](#)  17(0.5)

#### A.L.R. Library


A.L.R. Index, Bills and Notes

A.L.R. Index, Equity

A.L.R. Index, Lost or Destroyed Instruments

A.L.R. Index, Records and Recording

West's A.L.R. Digest, [Lost Instruments](#)  1 to 3

West's A.L.R. Digest, [Records](#)  17(0.5)

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 1

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### Lost and Destroyed Instruments


Lonnie E. Griffith, Jr., J.D.

#### I. Nature and Effect of Lost or Destroyed Instruments

### § 1. Definition of lost or destroyed instruments

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  1

A lost instrument is one that cannot be found after careful and thorough search,<sup>1</sup> giving due consideration to such factors as good faith,<sup>2</sup> due diligence,<sup>3</sup> and the absence of facts suggesting intentional destruction.<sup>4</sup>

An instrument cannot be considered lost if a known party is in possession of it.<sup>5</sup>

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#### Footnotes

- <sup>1</sup> Metlife Capital Corp. v. Westchester Fire Ins. Co., 224 F. Supp. 2d 374 (D.P.R. 2002) (applying Puerto Rico law); Dart Industries, Inc. v. Commercial Union Ins. Co., 28 Cal. 4th 1059, 124 Cal. Rptr. 2d 142, 52 P.3d 79 (2002); In re Estate of Berger, 174 S.W.3d 845 (Tex. App. Waco 2005).  
The instrument must be one lost, impaired, or destroyed bona fide. Mitchell Bank v. Schanke, 2004 WI 13, 268 Wis. 2d 571, 676 N.W.2d 849 (2004).
- <sup>2</sup> Dart Industries, Inc. v. Commercial Union Ins. Co., 28 Cal. 4th 1059, 124 Cal. Rptr. 2d 142, 52 P.3d 79 (2002); Sharonville v. Am. Employers Ins. Co., 109 Ohio St. 3d 186, 2006-Ohio-2180, 846 N.E.2d 833 (2006).
- <sup>3</sup> Hoerner v. ANCO Insulations, Inc., 812 So. 2d 45 (La. Ct. App. 4th Cir. 2002), writ denied, 819 So. 2d 1023 (La. 2002) and writ denied, 819 So. 2d 1023 (La. 2002) and writ denied, 819 So. 2d 1023 (La. 2002) and writ denied, 819 So. 2d 1024 (La. 2002).
- <sup>4</sup> Dart Industries, Inc. v. Commercial Union Ins. Co., 28 Cal. 4th 1059, 124 Cal. Rptr. 2d 142, 52 P.3d 79 (2002); In re Estate of Miller, 231 Neb. 723, 437 N.W.2d 793 (1989).
- <sup>5</sup> McNulty v. Great American Ins. Co., 727 F. Supp. 45, 11 U.C.C. Rep. Serv. 2d 587 (D. Mass. 1989) (applying Massachusetts law); Dlugie v. Robinson, 204 Pa. Super. 404, 204 A.2d 279, 2 U.C.C. Rep. Serv. 376 (1964).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 2

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### Lost and Destroyed Instruments


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#### I. Nature and Effect of Lost or Destroyed Instruments

## § 2. Instruments as evidence of obligation or debt

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  1

The loss or unintentional destruction of a written instrument does not generally affect the validity or sufficiency of the transaction it evidences, nor the rights or liabilities of the parties to the instrument,<sup>1</sup> although rights may be affected by the fraudulent destruction of an instrument by the claimant under the instrument.<sup>2</sup> Otherwise, the rights of the instrument's owner are not altered,<sup>3</sup> and the rights and obligations of the parties to a contract are not negated,<sup>4</sup> since the writing is merely evidence of their rights and obligations.<sup>5</sup>

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#### Footnotes

- <sup>1</sup> [Buster v. Gale](#), 866 P.2d 837, 24 U.C.C. Rep. Serv. 2d 1164 (Alaska 1994); [Mitchell Bank v. Schanke](#), 2004 WI 13, 268 Wis. 2d 571, 676 N.W.2d 849 (2004).
- <sup>2</sup> [Dart Industries, Inc. v. Commercial Union Ins. Co.](#), 28 Cal. 4th 1059, 124 Cal. Rptr. 2d 142, 52 P.3d 79 (2002).
- <sup>3</sup> [Mitchell Bank v. Schanke](#), 2004 WI 13, 268 Wis. 2d 571, 676 N.W.2d 849 (2004).
- <sup>4</sup> [New England Sav. Bank v. Bedford Realty Corp.](#), 238 Conn. 745, 680 A.2d 301, 31 U.C.C. Rep. Serv. 2d 1059 (1996).
- <sup>5</sup> [Bottum v. Herr](#), 83 S.D. 542, 162 N.W.2d 880 (1968); [Mitchell Bank v. Schanke](#), 2004 WI 13, 268 Wis. 2d 571, 676 N.W.2d 849 (2004).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 3

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### Lost and Destroyed Instruments


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#### I. Nature and Effect of Lost or Destroyed Instruments

### § 3. Instruments as obligations or debts; lottery tickets

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  1

#### A.L.R. Library

[State Lotteries: Actions by Ticketholders or Other Claimants Against State or Contractor for State](#), 48 A.L.R.6th 243  
(Recovery for missing, stolen, or void ticket)

The general rules governing the effect and potential enforcement of lost or destroyed instruments do not apply where the instrument itself is the obligation and the debt, as in the case of a lottery ticket.<sup>1</sup> Unlike a contract, bond, note, or other instrument which merely serve as evidence of an underlying obligation that is not changed by loss or destruction of the written evidence,<sup>2</sup> a winning lottery ticket is itself the obligation and debt, and payment is limited by statute to holders of the ticket,<sup>3</sup> meaning one in possession.<sup>4</sup> Otherwise, there is no relief under contract,<sup>5</sup> or in equity.<sup>6</sup>

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#### Footnotes

<sup>1</sup> [Karafa v. New Jersey State Lottery Commission](#), 129 N.J. Super. 499, 324 A.2d 97 (Ch. Div. 1974).

<sup>2</sup> [§ 2.](#)

<sup>3</sup> [Karafa v. New Jersey State Lottery Commission](#), 129 N.J. Super. 499, 324 A.2d 97 (Ch. Div. 1974).

<sup>4</sup> [Miller v. State, Dept. of Lottery](#), 638 So. 2d 172 (Fla. Dist. Ct. App. 1st Dist. 1994).

<sup>5</sup> [Fowles v. State](#), 254 Kan. 557, 867 P.2d 357 (1994).

<sup>6</sup> [Ramirez v. Bureau of State Lottery](#), 186 Mich. App. 275, 463 N.W.2d 245, 13 U.C.C. Rep. Serv. 2d 827 (1990);

[Bamberger v. Ohio State Lottery Comm., 115 Ohio App. 3d 391, 685 N.E.2d 577 \(10th Dist. Franklin County 1996\).](#)

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 4

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### Lost and Destroyed Instruments


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#### I. Nature and Effect of Lost or Destroyed Instruments

## § 4. Instruments under statutes governing lost-and-found property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  1

Statutes governing lost-and-found property<sup>1</sup> treat “instruments” differently than other forms of personal property. Found “property” may be claimed by the finder, if the owner does not come forward. That is not the case with lost and found instruments.<sup>2</sup> Lost instruments, unlike personal property, are not to be returned to the finder,<sup>3</sup> since it is likely, from the very nature of an instrument, that its true owner can be traced with due diligence.<sup>4</sup>

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#### Footnotes

<sup>1</sup> Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property §§ 1 et seq.

<sup>2</sup> Fuentes v. Wendt, 106 Misc. 2d 1030, 436 N.Y.S.2d 801 (Sup 1981).

<sup>3</sup> Kubli v. Rosetti, 34 N.Y.2d 68, 356 N.Y.S.2d 29, 312 N.E.2d 167 (1974); Fuentes v. Wendt, 106 Misc. 2d 1030, 436 N.Y.S.2d 801 (Sup 1981).

<sup>4</sup> Fuentes v. Wendt, 106 Misc. 2d 1030, 436 N.Y.S.2d 801 (Sup 1981).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 5

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### Lost and Destroyed Instruments


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#### I. Nature and Effect of Lost or Destroyed Instruments

## § 5. Recorded instruments as public records

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  1 to 3

West's Key Number Digest, [Records](#)  17(0.5)

The destruction or loss of an instrument after it is lawfully recorded as a public record renders it ineffective to provide the constructive notice the recording was intended to achieve,<sup>1</sup> unless and until those claiming the benefit of the recording comply with statutory procedures for restoring the instrument.<sup>2</sup>

Statutes governing the restoration of records do not create new rights, or establish a record that did not exist, but only establish evidence as the original records would have been,<sup>3</sup> giving the substituted record the same effect and force as the original.<sup>4</sup>

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#### Footnotes

<sup>1</sup> [Vanlandingham v. Meridian Creek Drainage Dist.](#), 191 Miss. 345, 2 So. 2d 591 (1941).

<sup>2</sup> §§ 17 to 19.

<sup>3</sup> [East Georgia Land and Development Co., LLC v. Baker](#), 286 Ga. 551, 690 S.E.2d 145 (2010).

<sup>4</sup> [In re Taylor](#), 113 S.W.3d 385 (Tex. App. Houston 1st Dist. 2003).

## 52 Am. Jur. 2d Lost and Destroyed Instruments § 6

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### Lost and Destroyed Instruments


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#### I. Nature and Effect of Lost or Destroyed Instruments

### § 6. Unrecorded deed or lease

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  1

The effect of a delivered deed to pass title is not affected as between the parties by the fact that the deed is thereafter lost or destroyed.<sup>1</sup> The fact that a deed was lost or misplaced does not destroy the title of those claiming under it,<sup>2</sup> nor revert it in a grantor,<sup>3</sup> provided the instrument once existed and fulfilled the formalities required by law.<sup>4</sup>

The destruction of the physical evidence of a lease does not impair the validity of a lease.<sup>5</sup>

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#### Footnotes

<sup>1</sup> [Poor v. Lombard](#), 72 Mass. App. Ct. 719, 893 N.E.2d 1255 (2008).

<sup>2</sup> [Hardine v. Pioneer Nat. Title Ins.](#), 145 Ariz. 83, 699 P.2d 1314 (Ct. App. Div. 2 1985); [Riverwood Commercial Properties, Inc. v. Cole](#), 134 N.H. 487, 593 A.2d 1153 (1991).

<sup>3</sup> [State](#), by [Pai v. Thom](#), 58 Haw. 8, 563 P.2d 982 (1977).

<sup>4</sup> [Riverwood Commercial Properties, Inc. v. Cole](#), 134 N.H. 487, 593 A.2d 1153 (1991).

<sup>5</sup> [American Sav. and Loan Ass'n of Florida v. Atlantic Inv. Corp.](#), 436 So. 2d 442 (Fla. Dist. Ct. App. 4th Dist. 1983).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments II A Refs.

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### Lost and Destroyed Instruments

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#### II. Restoration, Re-Execution, or Re-Establishment

##### A. Written Instruments

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  2.1 to 8, 12

#### A.L.R. Library

A.L.R. Index, Best and Secondary Evidence

A.L.R. Index, Bills and Notes

A.L.R. Index, Equity

A.L.R. Index, Evidence Rules

A.L.R. Index, Lost or Destroyed Instruments

West's A.L.R. Digest, [Lost Instruments](#)  2.1 to 8, 12

#### Trial Strategy

[Foundation for Admission of Secondary Evidence](#), 35 Am. Jur. Proof of Facts 2d 147

#### Forms

[Am. Jur. Legal Forms 2d §§ 169:4 to 169:7, 169:17 to 169:24](#)

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments §§ 4, 21.1, 26, 28, 31](#)

**Model Codes and Restatements**

[Restatement Second, Contracts § 137](#)

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 7

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### Lost and Destroyed Instruments

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#### II. Restoration, Re-Execution, or Re-Establishment

##### A. Written Instruments

###### 1. In General

### § 7. Right or necessity of action

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  [2.1](#), [3](#), [12](#)

#### Forms

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments § 4](#) (Statutory references)

A common-law action will lie to compel giving a duplicate for a lost instrument,<sup>1</sup> whether in law<sup>2</sup> or equity.<sup>3</sup> When it is established that the instrument existed,<sup>4</sup> fulfilled formalities required by the law, and is lost,<sup>5</sup> it may be judicially restored or reexecuted.<sup>6</sup>

Statutes also provide for reestablishing lost or destroyed papers, records, and files,<sup>7</sup> insurance policies,<sup>8</sup> lease agreements,<sup>9</sup> notes underlying mortgages,<sup>10</sup> mortgages,<sup>11</sup> and deeds.<sup>12</sup>

#### Reminder:

Uniform Commercial Code provisions govern lost or destroyed negotiable instruments.<sup>13</sup>

Footnotes

- <sup>1</sup> Fuentes v. Wendt, 106 Misc. 2d 1030, 436 N.Y.S.2d 801 (Sup 1981).
- <sup>2</sup> Mountain Mission School, Inc. v. White, 204 Va. 256, 130 S.E.2d 452 (1963).
- <sup>3</sup> Karafa v. New Jersey State Lottery Commission, 129 N.J. Super. 499, 324 A.2d 97 (Ch. Div. 1974).
- <sup>4</sup> Banks v. Mitsubishi Motors Credit of America, Inc., 435 F.3d 538 (5th Cir. 2005) (applying Mississippi law); Knit With v. Knitting Fever, Inc., 742 F. Supp. 2d 568, 83 Fed. R. Evid. Serv. 851 (E.D. Pa. 2010) (applying Pennsylvania law); MacThompson Realty, Inc. v. City of Nashua, 160 N.H. 175, 993 A.2d 773 (2010).
- <sup>5</sup> Sharonville v. Am. Employers Ins. Co., 109 Ohio St. 3d 186, 2006-Ohio-2180, 846 N.E.2d 833 (2006).
- <sup>6</sup> Mason v. Rubin, 727 So. 2d 283, 37 U.C.C. Rep. Serv. 2d 1087 (Fla. Dist. Ct. App. 4th Dist. 1999); Oberkramer v. Brown, 635 S.W.2d 63 (Mo. Ct. App. E.D. 1982).
- <sup>7</sup> Banks v. Mitsubishi Motors Credit of America, Inc., 435 F.3d 538 (5th Cir., 2005) (applying Mississippi law); Carlsen & Co., Inc. v. Feldman, 677 So. 2d 970 (Fla. Dist. Ct. App. 3d Dist. 1996).
- <sup>8</sup> § 16.
- <sup>9</sup> American Sav. and Loan Ass'n of Florida v. Atlantic Inv. Corp., 436 So. 2d 442 (Fla. Dist. Ct. App. 4th Dist. 1983).
- <sup>10</sup> Lawyers Title Ins. Co., Inc. v. Novastar Mortg., Inc., 862 So. 2d 793 (Fla. Dist. Ct. App. 4th Dist. 2003).
- <sup>11</sup> Shores v. First Florida Resource Corp., 267 So. 2d 696 (Fla. Dist. Ct. App. 2d Dist. 1972).
- <sup>12</sup> § 15.
- <sup>13</sup> Am. Jur. 2d, Bills and Notes §§ 279 to 287.

## 52 Am. Jur. 2d Lost and Destroyed Instruments § 8

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### Lost and Destroyed Instruments

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## II. Restoration, Re-Execution, or Re-Establishment


### A. Written Instruments

#### 1. In General

## § 8. Indemnity

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  4.5

### A.L.R. Library

[Time when, or stage of action at which, indemnity bond may or must be given in action on, or to establish and restore, a lost instrument, 9 A.L.R.2d 971](#)

### Forms

[Am. Jur. Legal Forms 2d §§ 169:17 to 169:24](#) (Indemnity Bond or Agreement on Payment on Lost or Destroyed Instrument)

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments § 32](#) (Indemnity Bond—Against loss from issuance of duplicate promissory note in lieu of lost note)

Courts may require furnishing an indemnity bond in a suit that seeks to restore, replace, or establish title or rights under a lost instrument.<sup>1</sup> For example, one recovering from the guarantor of a lost note should be required to post security to indemnify the guarantor from future actions based on the instrument.<sup>2</sup> Some statutes make the provision of security mandatory in such proceedings,<sup>3</sup> while other statutes allow the court discretion.<sup>4</sup>



Footnotes

- <sup>1</sup> Sills v. Waheed Enterprises, Inc., 253 A.D.2d 351, 676 N.Y.S.2d 170 (1st Dep't 1998).
- <sup>2</sup> Sills v. Waheed Enterprises, Inc., 253 A.D.2d 351, 676 N.Y.S.2d 170 (1st Dep't 1998).
- <sup>3</sup> Diaz v. Manufacturers Hanover Trust Co., 92 Misc. 2d 802, 401 N.Y.S.2d 952, 23 U.C.C. Rep. Serv. 385 (Sup 1977).
- <sup>4</sup> First Const. Co. v. Tri-South Mortg. Investors, 308 N.W.2d 298 (Minn. 1981); 487 Clinton Ave. Corp. v. Chase Manhattan Bank, 63 Misc. 2d 715, 313 N.Y.S.2d 445, 8 U.C.C. Rep. Serv. 69 (Sup 1970).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 9

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### Lost and Destroyed Instruments

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#### II. Restoration, Re-Execution, or Re-Establishment


##### A. Written Instruments

##### 1. In General

### § 9. Parties

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  6

#### Forms

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments § 28](#) (Notice—of hearing—to Establish Existence of Lost Contract for Sale of Real Property)

The owner of an instrument, including an owner by assignment, is a proper party to seek reestablishment of the instrument when it is lost.<sup>1</sup>

All parties having any claim to the lost instrument,<sup>2</sup> and all persons interested in the subject matter of the suit and whose rights will be directly affected by the decision,<sup>3</sup> should be joined in a case seeking restoration or reestablishment of a lost or destroyed instrument, as a decree confirming title derived from destroyed records is binding on those properly made defendants.<sup>4</sup>

The rights of all parties should be determined prior to reestablishing the lost instrument, and a court would not allow a reestablishment action to proceed lacking a convincing record that possible assignees or other transferees of mortgage interests were fully joined.<sup>5</sup>

In a suit against the heirs of the grantor to establish a deed, all the heirs, if known, should be made parties,<sup>6</sup> or at least the grantor and his or her representatives.<sup>7</sup>

Footnotes

- <sup>1</sup> Lawyers Title Ins. Co., Inc. v. Novastar Mortg., Inc., 862 So. 2d 793 (Fla. Dist. Ct. App. 4th Dist. 2003).
- <sup>2</sup> Shores v. First Florida Resource Corp., 267 So. 2d 696 (Fla. Dist. Ct. App. 2d Dist. 1972).
- <sup>3</sup> Cartright v. Cartright, 70 W. Va. 507, 74 S.E. 655 (1912).
- <sup>4</sup> Young v. Lake Dearborn Corp., 7 Ill. App. 2d 440, 129 N.E.2d 578 (1st Dist. 1955).
- <sup>5</sup> Shores v. First Florida Resource Corp., 267 So. 2d 696 (Fla. Dist. Ct. App. 2d Dist. 1972).
- <sup>6</sup> Cartright v. Cartright, 70 W. Va. 507, 74 S.E. 655 (1912).
- <sup>7</sup> Fleming v. Conklin, 237 Mich. 243, 211 N.W. 638 (1927).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 10

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### Lost and Destroyed Instruments

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## II. Restoration, Re-Execution, or Re-Establishment

### A. Written Instruments

#### 1. In General

## § 10. Defenses

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  [2.1](#), [3](#), [12](#)

Defenses to the defendant's obligation under the lost or destroyed instrument that the plaintiff seeks to have reestablished go to the underlying question of liability and are not direct defenses to the reestablishment of the instrument.<sup>1</sup>

Laches may apply to proceedings to reestablish a lost or destroyed document,<sup>2</sup> as may other available equitable defenses, such as a plea in abatement for failure to join unnamed heirs in a bill against the heirs of a grantor to restore a deed.<sup>3</sup>

### Practice Tip:

Statutory procedures for establishing documents destroyed in a disaster or calamity may preclude a defense that the party seeking relief must be free of fault or fraudulent intent.<sup>4</sup>

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### Footnotes

<sup>1</sup> [Dart Industries, Inc. v. Commercial Union Ins. Co.](#), 28 Cal. 4th 1059, 124 Cal. Rptr. 2d 142, 52 P.3d 79 (2002); [American Home Assur. Co. v. Junger](#), 982 So. 2d 90 (Fla. Dist. Ct. App. 3d Dist. 2008).

<sup>2</sup> Eggart v. Tennant, 260 Ala. 9, 68 So. 2d 714 (1953).

<sup>3</sup> Cartright v. Cartright, 70 W. Va. 507, 74 S.E. 655 (1912).

<sup>4</sup> Daddario v. Snow Valley, Inc., 36 Cal. App. 4th 1325, 43 Cal. Rptr. 2d 726 (4th Dist. 1995).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 11

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### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

## II. Restoration, Re-Execution, or Re-Establishment


### A. Written Instruments

#### 2. Admissibility of Evidence

## § 11. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  8

The rules of evidence ordinarily applicable in civil actions generally are operative in actions to establish lost instruments,<sup>1</sup> such as the general rules of relevance and hearsay.<sup>2</sup> A proper predicate must be laid and the evidence must be otherwise competent and admissible.<sup>3</sup>

Direct evidence is admissible, as in the case of evidence proving a deed,<sup>4</sup> and circumstantial evidence of both the content and execution of a lost document<sup>5</sup> and coverage is admissible.<sup>6</sup>

The unsigned draft of partnership agreement was admissible in a lost instruments suit by the putative partner against a supplier to show whether there was clear, mutual assent sufficient for the intent to form a partnership.<sup>7</sup>

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### Footnotes

<sup>1</sup> Estate of Lopes, 152 Cal. App. 3d 302, 199 Cal. Rptr. 425 (3d Dist. 1984); Placer Energy Corp. v. E & S Oil Co., Inc., 692 S.W.2d 197 (Tex. App. Fort Worth 1985).

<sup>2</sup> Dart Industries, Inc. v. Commercial Union Ins. Co., 28 Cal. 4th 1059, 124 Cal. Rptr. 2d 142, 52 P.3d 79 (2002).

<sup>3</sup> Klein v. Frank, 534 F.2d 1104 (5th Cir. 1976) (applying Florida law).

<sup>4</sup> Arreguin v. Cantu, 609 S.W.2d 639 (Tex. Civ. App. San Antonio 1980).

<sup>5</sup> American Sav. and Loan Ass'n of Florida v. Atlantic Inv. Corp., 436 So. 2d 442 (Fla. Dist. Ct. App. 4th Dist. 1983); Arreguin v. Cantu, 609 S.W.2d 639 (Tex. Civ. App. San Antonio 1980).

<sup>6</sup> In re Estate of Rosso, 270 Neb. 323, 701 N.W.2d 355 (2005).

<sup>7</sup> Knit With v. Knitting Fever, Inc., 742 F. Supp. 2d 568, 83 Fed. R. Evid. Serv. 851 (E.D. Pa. 2010) (applying Pennsylvania law).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 12

American Jurisprudence, Second Edition | May 2021 Update

### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

#### II. Restoration, Re-Execution, or Re-Establishment


##### A. Written Instruments

##### 2. Admissibility of Evidence

### § 12. Secondary evidence

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  8

#### A.L.R. Library

Statute excluding testimony of one person because of death of another as applied to testimony in respect of lost or destroyed instrument, 18 A.L.R.3d 606

Federal Rules of Evidence: Admissibility, pursuant to Rule 1004(1), of other evidence of contents of writing, recording, or photograph, where originals were allegedly lost or destroyed, 83 A.L.R. Fed. 554

#### Trial Strategy

[Foundation for Admission of Secondary Evidence](#), 35 Am. Jur. Proof of Facts 2d 147 §§ 7, 12 to 19 (Secondary Evidence of Lost or Destroyed Document)

In cases where the loss<sup>1</sup> or destruction of documents has been demonstrated, including a diligent search and inquiry for the missing document,<sup>2</sup> secondary evidence may be used to establish the content of the instrument,<sup>3</sup> provided the evidence is otherwise competent and admissible.<sup>4</sup>



**Practice Tip:**

In considering the admission of secondary evidence, if a suspicion hangs over the instrument, an inquiry should be made into the reasons for its nonproduction and whether there was a reasonably diligent effort to obtain the original.<sup>5</sup>

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**Footnotes**

- <sup>1</sup> Burt Rigid Box, Inc. v. Travelers Property Cas. Corp., 302 F.3d 83, 59 Fed. R. Evid. Serv. 936 (2d Cir. 2002) (applying New York law); Dart Industries, Inc. v. Commercial Union Ins. Co., 28 Cal. 4th 1059, 124 Cal. Rptr. 2d 142, 52 P.3d 79 (2002).
- <sup>2</sup> Bianchi v. Florists Mut. Ins. Co., 660 F. Supp. 2d 434 (E.D. N.Y. 2009) (applying New York law).
- <sup>3</sup> In re Marriage of Webb, 426 N.W.2d 402 (Iowa 1988).
- <sup>4</sup> Klein v. Frank, 534 F.2d 1104 (5th Cir. 1976) (applying Florida law).
- <sup>5</sup> Dart Industries, Inc. v. Commercial Union Ins. Co., 28 Cal. 4th 1059, 124 Cal. Rptr. 2d 142, 52 P.3d 79 (2002).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 13

American Jurisprudence, Second Edition | May 2021 Update

### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

#### II. Restoration, Re-Execution, or Re-Establishment


##### A. Written Instruments

##### 2. Admissibility of Evidence

### § 13. Parol evidence

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  8

#### A.L.R. Library

[Statute excluding testimony of one person because of death of another as applied to testimony in respect of lost or destroyed instrument, 18 A.L.R.3d 606](#)

In a proceeding to establish or reestablish a lost instrument, parol evidence is admissible to prove the existence,<sup>1</sup> terms,<sup>2</sup> contents,<sup>3</sup> and execution<sup>4</sup> of the instrument, provided, pursuant to some statutory provisions, there is corroboration of the facts.<sup>5</sup> In some jurisdictions, parol evidence is admissible only if the witness saw the writing and can testify clearly as to its content.<sup>6</sup>

#### Practice Tip:

Proof of a lost or destroyed memorandum is not precluded by the statute of frauds; the content may be shown by oral evidence.<sup>7</sup>

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Footnotes

- <sup>1</sup> [Murphree v. W.W. Transp.](#), 797 So. 2d 268 (Miss. Ct. App. 2001).  
Testimony was admissible but insufficient in the case of an alleged insurance policy. [Bianchi v. Florists Mut. Ins. Co.](#), 660 F. Supp. 2d 434 (E.D. N.Y. 2009) (applying New York law).
- <sup>2</sup> [A.G. Edwards & Sons, Inc. v. Beyer](#), 170 S.W.3d 684 (Tex. App. El Paso 2005), judgment aff'd in part, rev'd in part on other grounds, 235 S.W.3d 704 (Tex. 2007).
- <sup>3</sup> [In re Estate of Bell](#), 2003 WL 22282997 (Tex. App. El Paso 2003).
- <sup>4</sup> [La Capria v. Bonazza](#), 153 A.D.2d 551, 544 N.Y.S.2d 848 (2d Dep't 1989).
- <sup>5</sup> [Financial Corp. v. Estate of Cooley](#), 447 So. 2d 594 (La. Ct. App. 3d Cir. 1984).
- <sup>6</sup> [Placer Energy Corp. v. E & S Oil Co., Inc.](#), 692 S.W.2d 197 (Tex. App. Fort Worth 1985).  
The recorder of the instrument may testify as a corroborative witness. [Oberkramer v. Brown](#), 635 S.W.2d 63 (Mo. Ct. App. E.D. 1982).
- <sup>7</sup> [Restatement Second, Contracts § 137](#).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 14

American Jurisprudence, Second Edition | May 2021 Update

### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

#### II. Restoration, Re-Execution, or Re-Establishment


##### A. Written Instruments

##### 3. Burden and Sufficiency of Proof

### § 14. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  8

#### Forms

[Am. Jur. Legal Forms 2d § 169:4](#) (Form Drafting Guide—Checklist—Matters to be Considered in Drafting Affidavit of Loss)

[Am. Jur. Legal Forms 2d §§ 169:5 to 169:7](#) (Affidavit of Loss—Written Instruments)

The rules governing the weight and sufficiency of evidence in civil actions generally are applicable in actions to establish a lost instrument. The evidence of the former existence, execution, delivery, loss, and contents of the lost instrument must be clear and convincing,<sup>1</sup> particularly as applicable to deeds and oral contracts.<sup>2</sup> Other jurisdictions modify the standard, using similar terms, and including: clear, cogent, and convincing;<sup>3</sup> clear, satisfactory, and convincing;<sup>4</sup> clear and certain;<sup>5</sup> or clear, strong, and unequivocal.<sup>6</sup> There is also significant acceptance of the lesser standard of a preponderance of the evidence,<sup>7</sup> particularly as applied to insurance policies.<sup>8</sup>

Whether the evidence in any particular case is adequate for reestablishing an instrument is a matter for the trier of fact, and is not a matter of law,<sup>9</sup> as is the sufficiency of the proof of the loss of a document.<sup>10</sup> The question of sufficiency under the applicable standard is left largely to the trial court, whose determination, if supported by substantial evidence, is conclusive, absent an abuse of discretion.<sup>11</sup>

#### Practice Tip:

The strength of the evidence that a written agreement existed but was lost or destroyed, goes not to the admissibility of the evidence but to its weight, yielding a question for the trier of fact.<sup>12</sup>

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#### Footnotes

- <sup>1</sup> Metlife Capital Corp. v. Westchester Fire Ins. Co., 224 F. Supp. 2d 374 (D.P.R. 2002) (applying Puerto Rico law); American Home Assur. Co. v. Junger, 982 So. 2d 90 (Fla. Dist. Ct. App. 3d Dist. 2008); In re Estate of Rosso, 270 Neb. 323, 701 N.W.2d 355 (2005).
- <sup>2</sup> American Home Assur. Co. v. Junger, 982 So. 2d 90 (Fla. Dist. Ct. App. 3d Dist. 2008).
- <sup>3</sup> Braut v. Tarabochia, 104 Wash. App. 728, 17 P.3d 1248 (Div. 1 2001).
- <sup>4</sup> In re Marriage of Webb, 426 N.W.2d 402 (Iowa 1988).
- <sup>5</sup> O'Brien v. Town of Huntington, 66 A.D.3d 160, 884 N.Y.S.2d 446 (2d Dep't 2009), leave to appeal dismissed, 14 N.Y.3d 935, 905 N.Y.S.2d 557, 931 N.E.2d 541 (2010).
- <sup>6</sup> Zander v. Ogihara Corp., 213 Mich. App. 438, 540 N.W.2d 702 (1995).
- <sup>7</sup> Bianchi v. Florists Mut. Ins. Co., 660 F. Supp. 2d 434 (E.D. N.Y. 2009) (applying New York law); American Home Assur. Co. v. Junger, 982 So. 2d 90 (Fla. Dist. Ct. App. 3d Dist. 2008); PSI Energy, Inc. v. Home Ins. Co., 801 N.E.2d 705 (Ind. Ct. App. 2004).
- <sup>8</sup> § 16.
- <sup>9</sup> O'Donovan v. Citibank, FSB, 710 So. 2d 654 (Fla. Dist. Ct. App. 3d Dist. 1998).
- <sup>10</sup> Gutierrez v. Bermudez, 540 So. 2d 888, 9 U.C.C. Rep. Serv. 2d 1310 (Fla. Dist. Ct. App. 5th Dist. 1989).
- <sup>11</sup> Dart Industries, Inc. v. Commercial Union Ins. Co., 28 Cal. 4th 1059, 124 Cal. Rptr. 2d 142, 52 P.3d 79 (2002).
- <sup>12</sup> United Cable Television of Jeffco, Inc. v. Montgomery LC, Inc., 942 P.2d 1230 (Colo. App. 1996).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 15

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### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

#### II. Restoration, Re-Execution, or Re-Establishment


##### A. Written Instruments

##### 3. Burden and Sufficiency of Proof

### § 15. Deeds

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  8

#### Forms

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments § 21.1](#) (Affidavit—Loss of Deed—by Grantee)

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments § 26](#) (Affidavit—Showing Contents of Lost Deed)

The courts have long found the practice of inferring the existence of a lost deed proper, despite the risks of doing so,<sup>1</sup> but require that evidence sufficiently show the proper execution of the deed with the required formalities, delivery of the deed, the contents of the deed,<sup>2</sup> and the deed's former existence and loss.<sup>3</sup> Evidence must show a description of the property, the nature and extent of the petitioner's interest, a description of the petitioner's evidence of title, and the date and contents of the evidence of title.<sup>4</sup>

The name of the person who executed the deed can be proven by the testimony of someone who saw the deed at one time, or of the recorder of the instrument.<sup>5</sup> Evidence consisting of the testimony of a notary public and corroborating testimony was sufficient to establish that a conveyance was in fact executed.<sup>6</sup>

Circumstantial evidence sufficient to establish a missing record of a conveyance must show a probability of the missing grant, not a mere possibility. A lengthy period of possession by a party and proof of circumstances that can only be reasonably understood on the assumption that a conveyance has been made, have supplied such evidence.<sup>7</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Limited liability company (LLC) failed to demonstrate existence of purportedly lost deed from original property owner's alleged sale of certain property, in its action for quiet title on property based on adverse possession; LLC's assertion of 100 percent interest in property was completely dependent on existence of pre-death conveyance by owner, but LLC did not set forth any evidence of execution of lost deed or its contents, as no evidence had been adduced that indicated grantee, date of sale, or consideration provided for property. *Ka%7fUpulehu Land LLC v. Heirs and Assigns of Pahukula*, 136 Haw. 123, 358 P.3d 692 (2015).

### [END OF SUPPLEMENT]

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### Footnotes

- <sup>1</sup> [Poor v. Lombard](#), 72 Mass. App. Ct. 719, 893 N.E.2d 1255 (2008).
- <sup>2</sup> [Bruner v. Walker](#), 366 So. 2d 695 (Ala. 1978); [La Capria v. Bonazza](#), 153 A.D.2d 551, 544 N.Y.S.2d 848 (2d Dep't 1989).
- <sup>3</sup> [Bruner v. Walker](#), 366 So. 2d 695 (Ala. 1978).
- <sup>4</sup> [Oberkramer v. Brown](#), 635 S.W.2d 63 (Mo. Ct. App. E.D. 1982).
- <sup>5</sup> [Oberkramer v. Brown](#), 635 S.W.2d 63 (Mo. Ct. App. E.D. 1982).
- <sup>6</sup> [Rogers v. Williams](#), 400 So. 2d 1110 (La. Ct. App. 1st Cir. 1981), writ not considered, 401 So. 2d 1197 (La. 1981).
- <sup>7</sup> [Brooks Pond Conservation Ass'n, Inc. v. Starr](#), 26 Mass. L. Rptr. 411, 2010 WL 653995 (Mass. Super. Ct. 2010).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 16

American Jurisprudence, Second Edition | May 2021 Update

### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

#### II. Restoration, Re-Execution, or Re-Establishment


##### A. Written Instruments

##### 3. Burden and Sufficiency of Proof

## § 16. Insurance policies

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  8

In proving a lost or destroyed insurance policy, an insured seeking to prove coverage under a policy identifiable and shown to have been issued or acknowledged by the insurer, need only do so by a preponderance of the evidence.<sup>1</sup> The insurer generally bears the burden of establishing applicable exclusions in an action on a lost insurance policy,<sup>2</sup> as the insurer is in the best position to produce evidence of coverage limitations.<sup>3</sup>

#### Observation:

Courts have explained a preponderance standard for proof of lost or destroyed insurance policies as based on a concern that a higher standard of proof might encourage insurance carriers to destroy policies in the hope that those insured would be unable to produce them.<sup>4</sup>

A claimant's unsupported assertion of coverage, despite the insurer's admission of prior coverage at one time, is insufficient to show the existence and terms of an alleged lost insurance policy, even under a preponderance of the evidence standard.<sup>5</sup>

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#### Footnotes



<sup>1</sup> American Home Assur. Co. v. Junger, 982 So. 2d 90 (Fla. Dist. Ct. App. 3d Dist. 2008).

<sup>2</sup> Century Indem. Co. v. Aero-Motive Co., 254 F. Supp. 2d 670 (W.D. Mich. 2003) (applying Michigan law); American Home Assur. Co. v. Junger, 982 So. 2d 90 (Fla. Dist. Ct. App. 3d Dist. 2008).

<sup>3</sup> American Home Assur. Co. v. Junger, 982 So. 2d 90 (Fla. Dist. Ct. App. 3d Dist. 2008).

<sup>4</sup> Gold Fields American Corp. v. Aetna Cas. and Sur. Co., 173 Misc. 2d 901, 661 N.Y.S.2d 948 (Sup 1997).

<sup>5</sup> Bianchi v. Florists Mut. Ins. Co., 660 F. Supp. 2d 434 (E.D. N.Y. 2009) (applying New York law).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments II B Refs.

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### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

#### II. Restoration, Re-Execution, or Re-Establishment

##### B. Records

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#) 🔑 2.1 to 10

West's Key Number Digest, [Records](#) 🔑 17(0.5) to 17(7)

#### Primary Authority

[28 U.S.C.A. §§ 1734, 1735](#)

#### A.L.R. Library

A.L.R. Index, Best and Secondary Evidence

A.L.R. Index, Equity

A.L.R. Index, Evidence Rules

A.L.R. Index, Lost or Destroyed Instruments

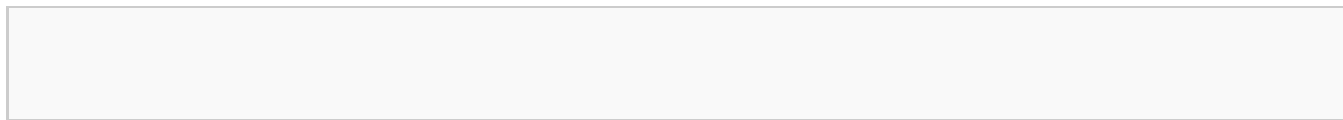
A.L.R. Index, Records and Recording

West's A.L.R. Digest, [Lost Instruments](#) 🔑 2.1 to 10

West's A.L.R. Digest, [Records](#) 🔑 17(0.5) to 17(7)

#### Forms

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments §§ 40 to 51, 54, 55, 58](#)



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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 17

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### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

#### II. Restoration, Re-Execution, or Re-Establishment


##### B. Records

##### 1. In General

### § 17. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  2.1, 3

West's Key Number Digest, [Records](#)  17(0.5)

#### Forms

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments §§ 54, 55](#) (Petition or Application—to Quiet Title to Real Property—Public Records Destroyed)

State statutes may provide a procedure for replacing lost or destroyed public records.<sup>1</sup> For example, one such statute authorizes the replacement of previously recorded but lost documents, unrelated to any court proceedings, such as a deed, bond, bill of sale, mortgage, deed of trust, power of attorney, or conveyance.<sup>2</sup> The purpose of such statutes is to enable a means for restoring the record as it existed.<sup>3</sup> To restore constructive notice under a record, a statute may provide that a lost, stolen or destroyed record shall not constitute “constructive notice” unless the instrument is again placed on record or proceedings are commenced to perfect the record within a specified time.<sup>4</sup>

The general power of the courts to restore lost or destroyed public records includes restoring state documents, such as a certificate of taxes paid on property.<sup>5</sup>

#### Observation:

Under the Freedom of Information Act, an agency has no duty to reconstruct and produce responsive documents that have been destroyed, nor to find missing documents, or create new ones.<sup>6</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Non-profit government watchdog group satisfied redressability prong of Article III standing analysis in its action against Securities and Exchange Commission (SEC), alleging violation of Federal Records Act (FRA) related to SEC policy regarding retention of preliminary investigative materials and SEC's failure to undertake efforts to recover and restore records destroyed under that policy, where group did not seek order requiring Attorney General, as third party, to undertake specific action, but rather sought order requiring SEC to ask Attorney General to initiate legal action. [U.S.C.A. Const. Art. 3, § 1 et seq.](#); [44 U.S.C.A. § 2101 et seq.](#) [Citizens for Responsibility and Ethics in Washington v. U.S. S.E.C.](#), 858 F. Supp. 2d 51 (D.D.C. 2012).

## [END OF SUPPLEMENT]

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### Footnotes

- <sup>1</sup> [Hill v. Persons Claiming Any Interest in or Lien upon Certain Real Property](#), 329 Mich. 683, 46 N.W.2d 584 (1951).
- <sup>2</sup> [In re Taylor](#), 113 S.W.3d 385 (Tex. App. Houston 1st Dist. 2003).
- <sup>3</sup> [East Georgia Land and Development Co., LLC v. Baker](#), 286 Ga. 551, 690 S.E.2d 145 (2010); [People v. Wells](#), 182 Ill. 2d 471, 231 Ill. Dec. 311, 696 N.E.2d 303 (1998).
- <sup>4</sup> [Vanlandingham v. Meridian Creek Drainage Dist.](#), 191 Miss. 345, 2 So. 2d 591 (1941).
- <sup>5</sup> [Wilkerson v. Moore](#), 294 Ala. 373, 318 So. 2d 241 (1975).
- <sup>6</sup> [Am. Jur. 2d, Freedom of Information Acts § 60.](#)

## 52 Am. Jur. 2d Lost and Destroyed Instruments § 18

American Jurisprudence, Second Edition | May 2021 Update

### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

## II. Restoration, Re-Execution, or Re-Establishment


### B. Records

#### 1. In General

## § 18. Parties and notice

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  6

West's Key Number Digest, [Records](#)  17(5)

Persons who have interests that might be affected must have notice of a proceeding to restore records,<sup>1</sup> as may be satisfied by substituted service by publication on nonresident and unknown defendants.<sup>2</sup>

Persons entitled to be made parties, but who are not joined in the proceeding, are not concluded by the determination in favor of the petitioner.<sup>3</sup> A plaintiff was, however, entitled to a duplicate tax certificate and tax deed, despite the fact that the heirs of an owner of the property that was sold to the state at a tax sale were not parties to the suit.<sup>4</sup>

A county recorder was a proper party and a real party in interest in a statutory proceeding for recording a copy of a previously recorded map which had been destroyed.<sup>5</sup>

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### Footnotes

<sup>1</sup> [Hill v. Persons Claiming Any Interest in or Lien upon Certain Real Property](#), 329 Mich. 683, 46 N.W.2d 584 (1951).

<sup>2</sup> [American Land Co. v. Zeiss](#), 219 U.S. 47, 31 S. Ct. 200, 55 L. Ed. 82 (1911).

<sup>3</sup> [Mountain Mission School, Inc. v. White](#), 204 Va. 256, 130 S.E.2d 452 (1963).

<sup>4</sup> [Wilkerson v. Moore](#), 294 Ala. 373, 318 So. 2d 241 (1975).

<sup>5</sup> [Lakeside Park Association v. Sweeney](#), 157 Cal. App. 2d 101, 320 P.2d 513 (3d Dist. 1958).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 19

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### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

## II. Restoration, Re-Execution, or Re-Establishment


### B. Records

#### 1. In General

## § 19. Evidence and proof

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  8

West's Key Number Digest, [Records](#)  17(7)

### Forms

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments § 58](#) (Affidavit—by Petitioner—in Action to Quiet Title to Real Property—Public Records Destroyed)

A prima facie case for restoring a lost state document may be made under statutes authorizing courts to restore lost or destroyed records. The same is true under the general power of the courts.<sup>1</sup> Thus, proof that a record which once existed had disappeared and could not be produced, was sufficient to restore the lost record to files. It was not necessary to prove all the preliminary steps taken with reference to an election, as the court would presume the legality and validity of those steps from the proof of the general result.<sup>2</sup>

A statute may allow parol proof of a lost or destroyed record as a basis for establishing the record.<sup>3</sup> For example, circumstantial evidence and parol evidence were admissible to prove a county zoning ordinance.<sup>4</sup>

A court of equity will not enter a decree to restore an erroneous condition to a record and to continue or perpetuate an error.<sup>5</sup>

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### Footnotes



- <sup>1</sup> Wilkerson v. Moore, 294 Ala. 373, 318 So. 2d 241 (1975).
- <sup>2</sup> Dennis v. Hite, 28 Ill. App. 2d 429, 172 N.E.2d 36 (4th Dist. 1961).
- <sup>3</sup> Jauregui Partners, Ltd. v. Grubb & Ellis Commercial Real Estate Services, 960 S.W.2d 334 (Tex. App. Corpus Christi 1997).
- <sup>4</sup> East Georgia Land and Development Co., LLC v. Baker, 286 Ga. 551, 690 S.E.2d 145 (2010).
- <sup>5</sup> Conn v. Cornish, 7 Fay. L.J. 47 (Pa. C.P. 1944).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 20

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### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

#### II. Restoration, Re-Execution, or Re-Establishment


##### B. Records

##### 2. Judicial Records

### § 20. Power of court to restore or replace

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  2.1, 3

West's Key Number Digest, [Records](#)  17(0.5) to 17(2)

Inherent in every court of general jurisdiction is the power to restore or substitute papers, files, and records which have been lost or destroyed,<sup>1</sup> as when entertaining an action to quiet title to real property affected by the destruction of court records.<sup>2</sup> This power is a matter of necessity, whether the loss occurs while the cause is in fieri, before it has progressed to final judgment, or after judgment has been rendered. It does not matter whether the loss is of the whole record or merely of papers that are only a part of it.<sup>3</sup>

Statutes may provide for the restoration of court records destroyed or lost,<sup>4</sup> including loss by conflagration or other public calamity. Such statutes are remedial and should be liberally construed to effectuate their objects,<sup>5</sup> but the courts must proceed cautiously in any proceeding to restore lost records.<sup>6</sup>

Given the inherent powers of the court to restore its own records, statutory methods for supplying lost records may not be the exclusive method of doing so.<sup>7</sup>

The effect of restoring a lost record is to give it the same force and effect, and to relate it back and take effect from the time when the original allowance, judgment, or decree was rendered.<sup>8</sup> The effect of an order authorizing filing nunc pro tunc of a copy of a lost judicial document is the same as though the original papers were found and put back in the file.<sup>9</sup>

#### Practice Tip:

Federal statutes govern the restoration and use of lost or destroyed records or files of a court of the United States,<sup>10</sup> or lost or destroyed records in any case or matter in any court of the United States to which the United States is a party.<sup>11</sup>

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Footnotes

- <sup>1</sup> People v. Wells, 182 Ill. 2d 471, 231 Ill. Dec. 311, 696 N.E.2d 303 (1998); Law v. Hemmingsen, 249 Iowa 820, 89 N.W.2d 386 (1958).
- <sup>2</sup> Callan v. Superior Court In and For San Mateo County, 204 Cal. App. 2d 652, 22 Cal. Rptr. 508 (1st Dist. 1962).
- <sup>3</sup> In re Shoup's Will, 130 Kan. 53, 285 P. 554 (1930); State v. Ireland, 109 Me. 158, 83 A. 453 (1912).
- <sup>4</sup> In re Taylor, 113 S.W.3d 385 (Tex. App. Houston 1st Dist. 2003).
- <sup>5</sup> In re Klepsch's Estate, 36 Cal. App. 2d 483, 97 P.2d 987 (1st Dist. 1940).
- <sup>6</sup> In re Bird's Estate, 410 Ill. 390, 102 N.E.2d 329 (1951).
- <sup>7</sup> Smith v. Louisville Trust Co., 262 S.W.2d 479 (Ky. 1953) (Ky.).
- <sup>8</sup> McDaniel v. Prairie County, 187 Ark. 38, 58 S.W.2d 200 (1933).
- <sup>9</sup> City and County of San Francisco v. Carraro, 220 Cal. App. 2d 509, 33 Cal. Rptr. 696 (1st Dist. 1963).
- <sup>10</sup> 28 U.S.C.A. §§ 1734, 1735(b).
- <sup>11</sup> 28 U.S.C.A. § 1735(a).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 21

American Jurisprudence, Second Edition | May 2021 Update

### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

#### II. Restoration, Re-Execution, or Re-Establishment


##### B. Records

##### 2. Judicial Records

## § 21. Types of judicial records restored or replaced

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  2.1, 3

West's Key Number Digest, [Records](#)  17(0.5) to 17(2)

### Forms

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments § 45](#) (Petition—for Restoration of Lost Judgment)

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments § 46](#) (Affidavit—Showing Contents of Lost Complaint)

The various types of court records and papers that may be lost or destroyed leads to an equivalent variety of statutory treatments,<sup>1</sup> but provisions commonly address any original petition, answer, declaration, plea, bill of indictment, special presentment, or other office paper that may be lost.<sup>2</sup> Under a court records recovery act, it is immaterial whether the lost record was an initial pleading, or an appearance, or an entire record.<sup>3</sup> Replacement decisions have included the lost orders of a court,<sup>4</sup> a bill of complaint,<sup>5</sup> a petition,<sup>6</sup> verdicts, judgments, and decrees,<sup>7</sup> a notice of a trial and affidavit of service,<sup>8</sup> appointment papers for a trustee,<sup>9</sup> a copy of the court's findings,<sup>10</sup> and a search warrant.<sup>11</sup>

Excluded from a replacement procedure for papers pertaining to a pending suit are papers for a suit already tried and pending on appeal.<sup>12</sup>

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#### Footnotes

§ 21. Types of judicial records restored or replaced, 52 Am. Jur. 2d Lost and...

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- <sup>1</sup> People v. Wells, 182 Ill. 2d 471, 231 Ill. Dec. 311, 696 N.E.2d 303 (1998).
- <sup>2</sup> Felker v. Johnson, 189 Ga. 797, 7 S.E.2d 668 (1940).
- <sup>3</sup> In re Bird's Estate, 410 Ill. 390, 102 N.E.2d 329 (1951).
- <sup>4</sup> Jauregui Partners, Ltd. v. Grubb & Ellis Commercial Real Estate Services, 960 S.W.2d 334 (Tex. App. Corpus Christi 1997).
- <sup>5</sup> Griffin v. Land, 214 Miss. 557, 59 So. 2d 290 (1952).
- <sup>6</sup> Bailey v. Hargett, 118 Ga. App. 337, 163 S.E.2d 830 (1968).
- <sup>7</sup> In re Taylor, 113 S.W.3d 385 (Tex. App. Houston 1st Dist. 2003).
- <sup>8</sup> City and County of San Francisco v. Carraro, 220 Cal. App. 2d 509, 33 Cal. Rptr. 696 (1st Dist. 1963).
- <sup>9</sup> State Trust Co. v. Toms, 244 N.C. 645, 94 S.E.2d 806 (1956).
- <sup>10</sup> Schomer v. R.L. Craig Co., 137 Cal. App. 620, 31 P.2d 396 (3d Dist. 1934).
- <sup>11</sup> People v. Wells, 182 Ill. 2d 471, 231 Ill. Dec. 311, 696 N.E.2d 303 (1998).
- <sup>12</sup> Rusca & Cunningham v. Hammett, 195 So. 642 (La. Ct. App. 2d Cir. 1940).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 22

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### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

#### II. Restoration, Re-Execution, or Re-Establishment

##### B. Records

##### 2. Judicial Records

### § 22. Procedure

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  2.1 to 10

West's Key Number Digest, [Records](#)  17(0.5) to 17(6)

#### Forms

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments §§ 40 to 45](#) (Petition or Application for Restoration of Lost or Destroyed Court Records)

Statutes may prescribe the procedure to obtain restoration or substitution of lost or destroyed judicial records,<sup>1</sup> and they address the issue in various ways, such as by permitting a party to seek a court declaration as to whether a record existed, and if so, what the substance of it was.<sup>2</sup> By statute in one jurisdiction, a person interested in supplying a lost order of the court, or other lost, destroyed, or removed records, may file a written application with the court setting forth facts that entitle the claimant to relief.<sup>3</sup> Even so, statutory provisions do not necessarily preclude resort to other modes of relief, particularly where the statutory remedy is made cumulative.<sup>4</sup>

The substitution or restoration may be done by the court at any time, both after and during the term.<sup>5</sup> A trial court did not abuse its discretion in entering an order to substitute a reexecuted order granting a new trial to a party, after the original order granting a new trial was apparently misplaced.<sup>6</sup>

#### Practice Tip:

Federal statutes govern procedures to restore lost or destroyed records or files of a court of the United States,<sup>7</sup> or lost or destroyed

records in any case or matter in any court of the United States to which the United States is a party.<sup>8</sup>

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#### Footnotes

- <sup>1</sup> In re Taylor, 113 S.W.3d 385 (Tex. App. Houston 1st Dist. 2003).
- <sup>2</sup> People v. Wells, 182 Ill. 2d 471, 231 Ill. Dec. 311, 696 N.E.2d 303 (1998).
- <sup>3</sup> In re Taylor, 113 S.W.3d 385 (Tex. App. Houston 1st Dist. 2003).
- <sup>4</sup> In re Shoup's Will, 130 Kan. 53, 285 P. 554 (1930).
- <sup>5</sup> Gagnon v. U.S., 193 U.S. 451, 24 S. Ct. 510, 48 L. Ed. 745 (1904).
- <sup>6</sup> In re Taylor, 113 S.W.3d 385 (Tex. App. Houston 1st Dist. 2003).
- <sup>7</sup> 28 U.S.C.A. §§ 1734, 1735(b).
- <sup>8</sup> 28 U.S.C.A. § 1735(a).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 23

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### Lost and Destroyed Instruments

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#### II. Restoration, Re-Execution, or Re-Establishment


##### B. Records

##### 2. Judicial Records

### § 23. Procedure—Parties and notice

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  6

West's Key Number Digest, [Records](#)  17(5)

#### Forms

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments §§ 40, 41, 47 to 51](#) (Notice and Order for Hearing on Application or Petition for Order of Restoration of Lost or Destroyed Court Records)

An application for the replacement of a lost, destroyed, or removed record of the trial court must join as parties the persons having adverse interests to the applicant.<sup>1</sup> The substitution or restoration of a judicial record or parts thereof can be made only after proper notice to the opposite party.<sup>2</sup> Statutory notice must go not only to the parties to the proceeding that is the subject of the record to be restored, but to all known persons whose interests would be affected by the restoration decree.<sup>3</sup>

An ex parte order of substitution or restoration may be allowed where the adversary has not made a general appearance in the case to which the record relates.<sup>4</sup>

Intervention may be allowed where the motion is timely and the only effect of granting intervention is to make the application for the substitution of records an adversary proceeding.<sup>5</sup>

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#### Footnotes



<sup>1</sup> In re Taylor, 113 S.W.3d 385 (Tex. App. Houston 1st Dist. 2003).

<sup>2</sup> Strousse v. Strousse, 56 Ala. App. 436, 322 So. 2d 726 (Civ. App. 1975).

<sup>3</sup> In re Klepsch's Estate, 36 Cal. App. 2d 483, 97 P.2d 987 (1st Dist. 1940).

<sup>4</sup> Haney v. Haney, 163 Minn. 114, 203 N.W. 614 (1925).

<sup>5</sup> Strousse v. Strousse, 56 Ala. App. 436, 322 So. 2d 726 (Civ. App. 1975).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 24

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### Lost and Destroyed Instruments

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## II. Restoration, Re-Execution, or Re-Establishment


### B. Records

#### 2. Judicial Records

## § 24. Evidence and proof

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  8

West's Key Number Digest, [Records](#)  17(7)

After satisfactory proof has been produced of the existence and loss or destruction of the record, secondary or parol evidence of its contents is admissible.<sup>1</sup> The rule is applied to, among other things, destroyed orders, verdicts, judgments, and decrees,<sup>2</sup> warrants and summonses,<sup>3</sup> and pleadings.<sup>4</sup>

The personal knowledge of the judge before whom the case was tried is not essential to the substitution of a lost record,<sup>5</sup> but the judicial knowledge of the trial judge that he or she had made findings in the pending case which were lost is sufficient evidence of the loss to authorize the judge to make an ex parte order for the filing of a copy of the findings.<sup>6</sup>

There is a presumption that a document has been filed after it was handed to the clerk of court for filing, and the careless misplacement of the document does not rebut that presumption.<sup>7</sup> Copies of a lost court order and petition in an attorney's files have been the basis of the reestablishing of the order where the attorney's secretary identified the copies as a duplicate of the one the secretary saw the judge sign and the secretary testified to giving the order to the clerk of court to file.<sup>8</sup>

Where the original papers approving the appointment of a successor trustee have been lost, and the clerk of the court fails to record in a special proceeding document the fact that the order was entered, it is competent to prove by the affidavit of the parties to the proceeding that the judge had in fact made such an order.<sup>9</sup>

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### Footnotes

<sup>1</sup> [In re Taylor](#), 113 S.W.3d 385 (Tex. App. Houston 1st Dist. 2003).

- <sup>2</sup> In re Taylor, 113 S.W.3d 385 (Tex. App. Houston 1st Dist. 2003).
- <sup>3</sup> Howell v. Wysor, 74 W. Va. 589, 82 S.E. 503 (1914).
- <sup>4</sup> Spadra Creek Coal Co. v. Eureka Anthracite Coal Co., 104 Ark. 359, 148 S.W. 644 (1912).
- <sup>5</sup> Dunbarton Realty Co. v. Erickson, 143 Iowa 677, 120 N.W. 1025 (1909).
- <sup>6</sup> Schomer v. R.L. Craig Co., 137 Cal. App. 620, 31 P.2d 396 (3d Dist. 1934).
- <sup>7</sup> Schomer v. R.L. Craig Co., 137 Cal. App. 620, 31 P.2d 396 (3d Dist. 1934).
- <sup>8</sup> Bailey v. Hargett, 118 Ga. App. 337, 163 S.E.2d 830 (1968).
- <sup>9</sup> State Trust Co. v. Toms, 244 N.C. 645, 94 S.E.2d 806 (1956).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments III A Refs.

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### Lost and Destroyed Instruments

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### III. Enforcement of Lost or Destroyed Instruments

#### A. In General

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  13.1 to 19, 21

#### A.L.R. Library

A.L.R. Index, Bills and Notes

A.L.R. Index, Equity

A.L.R. Index, Lost or Destroyed Instruments

West's A.L.R. Digest, [Lost Instruments](#)  13.1 to 19, 21

#### Forms

[Am. Jur. Legal Forms 2d §§ 169:17 to 169:24](#)

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments § 69](#)

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 25

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### Lost and Destroyed Instruments

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### III. Enforcement of Lost or Destroyed Instruments

#### A. In General

## § 25. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  13.1 to 16

#### Forms

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments § 69](#) (Checklist—Drafting Complaint, Petition, or Declaration in Action on Lost or Destroyed Promissory Note)

The loss or destruction of an instrument does not affect the rights and obligations underlying the instrument and evidenced by it.<sup>1</sup> An action may be maintained to enforce the rights under the reestablished or restored instrument.<sup>2</sup>

The instrument must be lost or destroyed, and not in the hands of an alternate payee.<sup>3</sup> Even so, an action pending on a lost instrument is not defeated by production of the instrument,<sup>4</sup> and the loss or destruction of a written instrument during an action to enforce it does not necessarily abate the action.<sup>5</sup>

Some statutes allow parties to seek the reestablishment and enforcement of lost documents in a single lawsuit,<sup>6</sup> but the trier of fact should decide the reestablishment issue before the enforcement or breach issues.<sup>7</sup>

#### Reminder:

The Uniform Commercial Code contains provisions permitting the enforcement of lost, destroyed, or stolen instruments under certain circumstances,<sup>8</sup> including lost, destroyed, or stolen cashier's checks, teller's checks, or certified checks.<sup>9</sup>

**Practice Tip:**

Federal statutes provide that the lost or destroyed record of any case or matter in any court of the United States to which the United States is a party, shall have the same effect as an original paper filed in the court, upon compliance with the prescribed procedure.<sup>10</sup>

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## Footnotes

- <sup>1</sup> § 2.
- <sup>2</sup> *Banks v. Mitsubishi Motors Credit of America, Inc.*, 435 F.3d 538 (5th Cir. 2005) (applying Mississippi law); *Greeling v. Abendroth*, 351 Ill. App. 3d 658, 286 Ill. Dec. 292, 813 N.E.2d 768 (4th Dist. 2004).
- <sup>3</sup> *Greeling v. Abendroth*, 351 Ill. App. 3d 658, 286 Ill. Dec. 292, 813 N.E.2d 768 (4th Dist. 2004).
- <sup>4</sup> *Clark v. Nickell*, 73 W. Va. 69, 79 S.E. 1020 (1913).
- <sup>5</sup> *Austin v. Calloway*, 73 W. Va. 231, 80 S.E. 361 (1913).
- <sup>6</sup> *Banks v. Mitsubishi Motors Credit of America, Inc.*, 435 F.3d 538 (5th Cir. 2005) (applying Mississippi law).
- <sup>7</sup> *Carlsen & Co., Inc. v. Feldman*, 677 So. 2d 970 (Fla. Dist. Ct. App. 3d Dist. 1996).
- <sup>8</sup> Am. Jur. 2d, Bills and Notes § 279.
- <sup>9</sup> Am. Jur. 2d, Bills and Notes §§ 283 to 287.
- <sup>10</sup> § 20.

## 52 Am. Jur. 2d Lost and Destroyed Instruments § 26

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### Lost and Destroyed Instruments

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### III. Enforcement of Lost or Destroyed Instruments

#### A. In General

## § 26. Parties and notice

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  21

The person entitled to seek enforcement of a lost instrument is the person in possession of the instrument and entitled to enforce it when the loss occurred.<sup>1</sup> This is generally the owner of the instrument<sup>2</sup> and includes an original party to the instrument who retains the requisite interest,<sup>3</sup> or an assignee.<sup>4</sup>

A suit in equity should join as parties all persons whose interests will be affected by the final determination of the cause so that all matters may be adjusted and complete justice done.<sup>5</sup>

An action authorized by statute may require that the loss of an instrument be advertised within a reasonable time in a public paper in order to make the instrument the foundation of an enforcement action.<sup>6</sup>

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#### Footnotes

<sup>1</sup> [Beal Bank, S.S.B. v. Caddo Parish-Villas South, Ltd.](#), 218 B.R. 851, 34 U.C.C. Rep. Serv. 2d 1103 (N.D. Tex. 1998) (applying Louisiana law).

<sup>2</sup> [Lawyers Title Ins. Co., Inc. v. Novastar Mortg., Inc.](#), 862 So. 2d 793 (Fla. Dist. Ct. App. 4th Dist. 2003).

<sup>3</sup> [Smith v. Nelson](#), 83 S.C. 294, 65 S.E. 261 (1909).

<sup>4</sup> § 27.

<sup>5</sup> [Clark v. Nickell](#), 73 W. Va. 69, 79 S.E. 1020 (1913).

<sup>6</sup> [Wallace v. Recile](#), 453 So. 2d 606 (La. Ct. App. 4th Cir. 1984).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 27

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### Lost and Destroyed Instruments

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#### III. Enforcement of Lost or Destroyed Instruments

##### A. In General

## § 27. Parties and notice—Assignees and assignors

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  21

The assignee of a note for purposes of collection may generally maintain an action to recover on the lost note,<sup>1</sup> if the assignor of the note had the right of enforcement and assigned it,<sup>2</sup> since the assignee takes the rights and obligations as lawfully assigned.<sup>3</sup>

In a suit by an assignee of a lost note against the maker, necessary parties included one who testified that the maker had given him an assignment of the note, and included the assignor as the equitable owner.<sup>4</sup>

A mortgagee by assignment could not pursue a mortgage foreclosure in the absence of proof that either the mortgagee or its assignor ever had possession of the underlying promissory note.<sup>5</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

A mortgage assignee was entitled to enforce a promissory note that had been lost by the mortgage assignor; the terms of the note were established by a digital copy, there was no dispute that the assignor had the right to enforce the note under Article 3 of the Uniform Commercial Code (UCC) when it assigned the mortgage and transferred the note to the assignee, and the assignment of the mortgage and accompanying rights was valid under New Jersey's statutes governing assignment of rights. [N.J. Stat. Ann. §§ 2A:25-1, 12A:3-309, 46:9-9](#). [Investors Bank v. Torres](#), 243 N.J. 25, 233 A.3d 424, 102 U.C.C. Rep. Serv. 2d 366 (2020).

[END OF SUPPLEMENT]

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Footnotes

- <sup>1</sup> In re Caddo Parish-Villas South, Ltd., 250 F.3d 300, 45 U.C.C. Rep. Serv. 2d 1128 (5th Cir. 2001) (applying Louisiana law); Atlantic Nat. Trust, LLC v. McNamee, 984 So. 2d 375, 64 U.C.C. Rep. Serv. 2d 70 (Ala. 2007); Deakter v. Menendez, 830 So. 2d 124, 49 U.C.C. Rep. Serv. 2d 849 (Fla. Dist. Ct. App. 3d Dist. 2002).
- <sup>2</sup> State Street Bank and Trust Co. v. Lord, 851 So. 2d 790, 51 U.C.C. Rep. Serv. 2d 191 (Fla. Dist. Ct. App. 4th Dist. 2003).
- <sup>3</sup> Atlantic Nat. Trust, LLC v. McNamee, 984 So. 2d 375, 64 U.C.C. Rep. Serv. 2d 70 (Ala. 2007).
- <sup>4</sup> Bottum v. Herr, 83 S.D. 542, 162 N.W.2d 880 (1968).
- <sup>5</sup> State Street Bank and Trust Co. v. Lord, 851 So. 2d 790, 51 U.C.C. Rep. Serv. 2d 191 (Fla. Dist. Ct. App. 4th Dist. 2003).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 28

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### Lost and Destroyed Instruments

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### III. Enforcement of Lost or Destroyed Instruments

#### A. In General

## § 28. Indemnity

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  18

#### A.L.R. Library

[Time when, or stage of action at which, indemnity bond may or must be given in action on, or to establish and restore, a lost instrument, 9 A.L.R.2d 971](#)

#### Forms

[Am. Jur. Legal Forms 2d §§ 169:17 to 169:22](#) (Indemnity Agreement—Payment on Loss or Destroyed Written Instrument)

[Am. Jur. Legal Forms 2d §§ 169:23, 169:24](#) (Indemnity Bond or Agreement—Loss or Destruction of Instrument)

Generally, when the defendant may be damaged by a subsequent claim of a purchaser from the finder of a lost instrument, the court may require the plaintiff to furnish an indemnity bond with satisfactory sureties, or otherwise protect the defendant.<sup>1</sup> By statute, an indemnity bond may be a condition to the entry of a judgment obtained on a lost note or other negotiable instrument. The bond ensures that the person required to pay the instrument is adequately protected against loss that might occur by reason of that enforcement.<sup>2</sup>

A statutory bond is not necessarily a requirement precedent to the right to maintain or commence a suit on a lost note.<sup>3</sup> Some statutes only require a bond where circumstances render it necessary, rather than in every case,<sup>4</sup> as a bond would be unnecessary where there could be no collection under the lost instrument even if it existed.<sup>5</sup> Other statutes governing proof of

the loss of negotiable instruments mandate security, giving courts no discretion.<sup>6</sup>

A defendant who denies having executed the allegedly lost note cannot consistently ask that an indemnifying bond be required.<sup>7</sup>

**Reminder:**

Under the Uniform Commercial Code, the court may not enter judgment in favor of the person seeking to enforce a lost, stolen, or destroyed instrument unless it finds that the person required to pay the instrument is adequately protected.<sup>8</sup>

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Footnotes

- <sup>1</sup> Leeper v. Schroer, Rice, Bryan & Lykins, P.A., 241 Kan. 241, 736 P.2d 882 (1987); First Const. Co. v. Tri-South Mortg. Investors, 308 N.W.2d 298 (Minn. 1981).
- <sup>2</sup> Crystaplex Plastics, Ltd. v. Redevelopment Agency, 77 Cal. App. 4th 990, 92 Cal. Rptr. 2d 197, 40 U.C.C. Rep. Serv. 2d 784 (4th Dist. 2000).
- <sup>3</sup> Hach v. Anderson, 240 Iowa 792, 38 N.W.2d 94, 9 A.L.R.2d 968 (1949); Hays v. Dow, 237 Mo. App. 1, 166 S.W.2d 309 (1942).
- <sup>4</sup> Lacoste v. Hickey, 203 La. 794, 14 So. 2d 639 (1943).
- <sup>5</sup> Clemens v. Gibbs, 303 Mich. 417, 6 N.W.2d 730 (1942).
- <sup>6</sup> In re Rubin's Estate, 237 N.Y.S.2d 563 (Sur. Ct. 1963).
- <sup>7</sup> Hach v. Anderson, 240 Iowa 792, 38 N.W.2d 94, 9 A.L.R.2d 968 (1949).
- <sup>8</sup> Am. Jur. 2d, Bills and Notes § 280.

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 29

American Jurisprudence, Second Edition | May 2021 Update

### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.


### III. Enforcement of Lost or Destroyed Instruments

#### A. In General

## § 29. Defenses; limitations and laches

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  19

In suits on lost or destroyed instruments, the defendant may ordinarily set up whatever defenses might be made to the original instrument, as in the case of insurance policy exclusions or exemptions.<sup>1</sup> Recovery of money on a lost instrument may be barred by a statute of limitations.<sup>2</sup>

In equity, the right to make a proof of title by a lost deed is subject to the statute of limitations, laches, and stale demand.<sup>3</sup> When the defense of laches is raised, the plaintiff must have ample opportunity to explain the delay. Laches does not bar a claim based on a lost deed where the opposing party initiated litigation after the claimant had possessed the land in question and paid taxes on it for many years.<sup>4</sup>

Defenses of limitations, laches or stale demand did not apply where the record lacked proof of the date when the claiming parties discovered the loss of the deed.<sup>5</sup>

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### Footnotes

- <sup>1</sup> [Century Indem. Co. v. Aero-Motive Co.](#), 254 F. Supp. 2d 670 (W.D. Mich. 2003) (applying Michigan law); [Hoerner v. ANCO Insulations, Inc.](#), 812 So. 2d 45 (La. Ct. App. 4th Cir. 2002), writ denied, 819 So. 2d 1023 (La. 2002) and writ denied, 819 So. 2d 1023 (La. 2002) and writ denied, 819 So. 2d 1023 (La. 2002) and writ denied, 819 So. 2d 1024 (La. 2002).
- <sup>2</sup> [Lutz v. Gatlin](#), 22 Wash. App. 424, 590 P.2d 359, 26 U.C.C. Rep. Serv. 129 (Div. 3 1979).
- <sup>3</sup> [Chandler v. Brown](#), 301 S.W.2d 720 (Tex. Civ. App. El Paso 1957), writ refused n.r.e.
- <sup>4</sup> [Brooks v. Toperzer](#), 122 N.H. 139, 441 A.2d 1177 (1982).

<sup>5</sup> [Burns v. Goodrich, 382 S.W.2d 501 \(Tex. Civ. App. Tyler 1964\)](#), judgment [aff'd, 392 S.W.2d 689 \(Tex. 1965\)](#).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments III B Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.


### III. Enforcement of Lost or Destroyed Instruments

#### B. Evidence and Proof

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  23


#### A.L.R. Library

A.L.R. Index, Best and Secondary Evidence

A.L.R. Index, Bills and Notes

A.L.R. Index, Evidence Rules

A.L.R. Index, Lost or Destroyed Instruments

West's A.L.R. Digest, Lost Instruments  23

#### Trial Strategy

[Foundation for Admission of Secondary Evidence, 35 Am. Jur. Proof of Facts 2d 147](#)

#### Forms

[Am. Jur. Legal Forms 2d §§ 169:4 to 169:7](#)

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments §§ 69 to 72](#)

**Model Codes and Restatements**

[Restatement Second, Contracts § 137](#)

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 30

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### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

### III. Enforcement of Lost or Destroyed Instruments


#### B. Evidence and Proof

##### 1. Admissibility of Evidence

## § 30. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  23

The rules of evidence in civil actions apply in actions to recover on lost instruments.<sup>1</sup> The elements of the cause of action or defense should be proved by admissible evidence,<sup>2</sup> as may include secondary evidence,<sup>3</sup> or parol evidence.<sup>4</sup>

The existence, execution, and content of a lost instrument may be shown by circumstantial evidence.<sup>5</sup>

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#### Footnotes

<sup>1</sup> [Thomas C. Cook, Inc. v. Rowhanian](#), 700 S.W.2d 672, 42 U.C.C. Rep. Serv. 899 (Tex. App. El Paso 1985), writ refused n.r.e., (July 2, 1986).

<sup>2</sup> [Hamner v. Carroll's Creek Baptist Church](#), 255 Ala. 277, 51 So. 2d 164 (1951).

<sup>3</sup> § 31.

<sup>4</sup> § 33.

<sup>5</sup> [American Sav. and Loan Ass'n of Florida v. Atlantic Inv. Corp.](#), 436 So. 2d 442 (Fla. Dist. Ct. App. 4th Dist. 1983); [Arreguin v. Cantu](#), 609 S.W.2d 639 (Tex. Civ. App. San Antonio 1980).



## 52 Am. Jur. 2d Lost and Destroyed Instruments § 31

American Jurisprudence, Second Edition | May 2021 Update

### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

### III. Enforcement of Lost or Destroyed Instruments


#### B. Evidence and Proof

##### 1. Admissibility of Evidence

## § 31. Secondary evidence

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  23

#### A.L.R. Library

[Federal Rules of Evidence: Admissibility, pursuant to Rule 1004\(1\), of other evidence of contents of writing, recording, or photograph, where originals were allegedly lost or destroyed, 83 A.L.R. Fed. 554](#)

#### Trial Strategy

[Foundation for Admission of Secondary Evidence, 35 Am. Jur. Proof of Facts 2d 147](#) §§ 7, 12 to 19 (Secondary Evidence of Lost or Destroyed Document)

Secondary evidence is admissible to prove the content and existence of a lost or destroyed instrument.<sup>1</sup> The purpose of the best evidence rule is to produce the best obtainable evidence, and if a document cannot as a practical matter be produced because of its loss or destruction, then the production of the original is excused.<sup>2</sup> The loss or destruction of a document may be established by proof of a search for the document and the inability to secure it.<sup>3</sup>

A photocopy of a promissory note supporting a mortgage at issue may be properly admitted into evidence where the original disappeared after the foreclosure hearing, if supported by the testimony of officials in the office of the county clerk of court.<sup>4</sup> Where a deed was mailed to the grantee but lost, a letter transmitting the alleged deed to the grantee and describing the

contents of the deed is admissible as secondary evidence of the deed.<sup>5</sup>

Admitting a copied page of a real estate agreement into evidence did not violate the best evidence rule where the original was lost, given that the agent's testimony sufficiently established that, while negotiating the agreement, the pages were shuffled and the original first page was lost.<sup>6</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Negligent destruction of the original or the possibility that the proponent tampered with the secondary evidence is likely insufficient for bad faith, as element for exception to best evidence rule when all originals are lost or destroyed and the loss or destruction is not by the proponent acting in bad faith, but the purposeful destruction or withholding of originals and the fabrication of secondary evidence will support a finding of bad faith. [Fed.Rules Evid.Rule 1004\(a\)](#), 28 U.S.C.A. [Montoya v. Romero](#), 956 F. Supp. 2d 1268, 91 Fed. R. Evid. Serv. 1114 (D.N.M. 2013).

### [END OF SUPPLEMENT]

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### Footnotes

<sup>1</sup> [Burt Rigid Box, Inc. v. Travelers Property Cas. Corp.](#), 302 F.3d 83, 59 Fed. R. Evid. Serv. 936 (2d Cir. 2002) (applying New York law); [Century Indem. Co. v. Aero-Motive Co.](#), 254 F. Supp. 2d 670 (W.D. Mich. 2003) (applying Michigan law); [Archie Comic Publications, Inc. v. DeCarlo](#), 258 F. Supp. 2d 315 (S.D. N.Y. 2003), judgment entered, 2003 WL 21354692 (S.D. N.Y. 2003), [aff'd](#), 88 Fed. Appx. 468 (2d Cir. 2004) and [aff'd](#), 88 Fed. Appx. 468 (2d Cir. 2004) (applying New York law).

<sup>2</sup> [Jurek v. Couch-Jurek](#), 296 S.W.3d 864 (Tex. App. El Paso 2009).

<sup>3</sup> [In re Estate of Berger](#), 174 S.W.3d 845 (Tex. App. Waco 2005).

<sup>4</sup> [Pee Dee Production Credit Ass'n v. Joye](#), 284 S.C. 371, 326 S.E.2d 650 (1984).

<sup>5</sup> [Smith v. Smith](#), 95 Idaho 477, 511 P.2d 294 (1973).

<sup>6</sup> [PMS Hospitality, Inc. v. OM Realty Finance Co.](#), 2011 WL 258694 (Tex. App. Dallas 2011).

## 52 Am. Jur. 2d Lost and Destroyed Instruments § 32

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### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

#### III. Enforcement of Lost or Destroyed Instruments


##### B. Evidence and Proof

##### 1. Admissibility of Evidence

### § 32. Secondary evidence—Insurance policies

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  23

In the case of a lost insurance policy, an insured may rely on secondary evidence only where the insured demonstrates that it made a diligent but unsuccessful search and inquiry for the missing policy.<sup>1</sup> If the original policy is lost or destroyed, without bad faith, the proponent may offer testimony describing the content of the policy by a witness who saw and read the policy.<sup>2</sup>

#### Practice Tip:

The existence and contents of a missing insurance policy may be reconstructed from business records, an underwriter's folios, or billings of the insurance company to the insured.<sup>3</sup> Testimony regarding a regular business practice can be admitted to establish the existence and content of missing business documents.<sup>4</sup> Insurance ledgers are admissible as business records evidence of lost insurance policies, supported by testimony that the records are of the same type as regularly prepared by insured's accounting department.<sup>5</sup>

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#### Footnotes

<sup>1</sup> [Burt Rigid Box, Inc. v. Travelers Property Cas. Corp.](#), 302 F.3d 83, 59 Fed. R. Evid. Serv. 936 (2d Cir. 2002) (applying New York law).

§ 32. Secondary evidence—Insurance policies, 52 Am. Jur. 2d Lost and Destroyed...

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- <sup>2</sup>           Glew v. Cigna Group Ins., 590 F. Supp. 2d 395 (E.D. N.Y. 2008) (applying New York law); Sharonville v. Am. Employers Ins. Co., 109 Ohio St. 3d 186, 2006-Ohio-2180, 846 N.E.2d 833 (2006).
- <sup>3</sup>           Southern Union Co. v. Liberty Mut. Ins. Co., 581 F. Supp. 2d 120 (D. Mass. 2008) (applying Massachusetts law).
- <sup>4</sup>           Paul Revere Variable Annuity Ins. Co. v. Zang, 248 F.3d 1 (1st Cir. 2001) (applying Massachusetts law).
- <sup>5</sup>           Century Indem. Co. v. Aero-Motive Co., 254 F. Supp. 2d 670 (W.D. Mich. 2003) (applying Michigan law).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 33

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### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

#### III. Enforcement of Lost or Destroyed Instruments


##### B. Evidence and Proof

##### 1. Admissibility of Evidence

### § 33. Parol evidence

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  23

Parol evidence is ordinarily not admissible in proving written instruments, but an exception is generally recognized where proof of a lost instrument is concerned.<sup>1</sup> Under this rule, parties may use parol evidence to prove that a valid contract existed and what the terms of that contract were meant to be, so that loss or destruction of the instrument will not prevent its enforcement.<sup>2</sup>

Parol evidence may be limited to situations where a witness saw the writing and can testify clearly as to its content.<sup>3</sup>

The use of parol evidence to prove a debt of a deceased person based on a lost instrument requires the acknowledgement of the debt by a representative within one year of the death of a deceased.<sup>4</sup>

If the memorandum required by the statute of frauds was duly made and signed by the party to be charged, but is afterward lost or destroyed, its contents may be proved by oral testimony.<sup>5</sup>

#### Practice Tip:

Proof of a lost or destroyed memorandum is not precluded by the statute of frauds; the content may be shown by oral evidence.<sup>6</sup>

Footnotes

- <sup>1</sup> Banks v. Mitsubishi Motors Credit of America, Inc., 435 F.3d 538 (5th Cir. 2005) (applying Mississippi law); A.G. Edwards & Sons, Inc. v. Beyer, 170 S.W.3d 684 (Tex. App. El Paso 2005), judgment aff'd in part, rev'd in part on other grounds, 235 S.W.3d 704 (Tex. 2007).
- <sup>2</sup> Banks v. Mitsubishi Motors Credit of America, Inc., 435 F.3d 538 (5th Cir., 2005) (applying Mississippi law).
- <sup>3</sup> Glew v. Cigna Group Ins., 590 F. Supp. 2d 395 (E.D. N.Y. 2008) (applying New York law).
- <sup>4</sup> Financial Corp. v. Estate of Cooley, 447 So. 2d 594 (La. Ct. App. 3d Cir. 1984).
- <sup>5</sup> Zander v. Ogihara Corp., 213 Mich. App. 438, 540 N.W.2d 702 (1995).
- <sup>6</sup> Restatement Second, Contracts § 137.

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 34

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### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

### III. Enforcement of Lost or Destroyed Instruments


#### B. Evidence and Proof

#### 2. Burden and Standard of Proof

## § 34. Burden of proving elements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  23

#### Forms

[Am. Jur. Legal Forms 2d § 169:4](#) (Form Drafting Guide—Checklist—Matters to be Considered in Drafting Affidavit of Loss)

[Am. Jur. Legal Forms 2d §§ 169:5 to 169:7](#) (Affidavit of Loss—Written Instruments)

In accordance with the rules governing the burden of proof in civil actions generally, the party seeking to recover on a lost instrument has the burden of proving its former existence,<sup>1</sup> execution and delivery,<sup>2</sup> contents,<sup>3</sup> ownership of the instrument at the time of trial,<sup>4</sup> and the present unavailability,<sup>5</sup> theft,<sup>6</sup> or loss of the instrument.<sup>7</sup>

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#### Footnotes

<sup>1</sup> [Banks v. Mitsubishi Motors Credit of America, Inc.](#), 435 F.3d 538 (5th Cir. 2005) (applying Mississippi law); [In re Estate of Rosso](#), 270 Neb. 323, 701 N.W.2d 355 (2005).

<sup>2</sup> [Parker v. Barnes](#), 519 So. 2d 945 (Ala. 1988); [In re Estate of Rosso](#), 270 Neb. 323, 701 N.W.2d 355 (2005).

<sup>3</sup> [Southern Union Co. v. Liberty Mut. Ins. Co.](#), 581 F. Supp. 2d 120 (D. Mass. 2008) (applying Massachusetts law); [In re Estate of Rosso](#), 270 Neb. 323, 701 N.W.2d 355 (2005).

<sup>4</sup> Barber v. Ehrich, 394 So. 2d 220, 31 U.C.C. Rep. Serv. 1038 (Fla. Dist. Ct. App. 5th Dist. 1981).

<sup>5</sup> Banks v. Mitsubishi Motors Credit of America, Inc., 435 F.3d 538 (5th Cir. 2005) (applying Mississippi law).

<sup>6</sup> In re Estate of Rosso, 270 Neb. 323, 701 N.W.2d 355 (2005).

<sup>7</sup> In re Estate of Rosso, 270 Neb. 323, 701 N.W.2d 355 (2005).

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### Lost and Destroyed Instruments

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### III. Enforcement of Lost or Destroyed Instruments


#### B. Evidence and Proof

##### 2. Burden and Standard of Proof

## § 35. Standard of proof

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  23

The courts have used a variety of terms to describe the standard or degree of proof required to establish the existence and contents of a lost instrument, generally resting most heavily on the clear and convincing standard,<sup>1</sup> but also adding qualifiers requiring evidence that is cogent;<sup>2</sup> clear and certain;<sup>3</sup> or conclusive.<sup>4</sup> Other jurisdictions, however, require that the proof only reach the lesser standard of a preponderance of the evidence,<sup>5</sup> and variations apply in actions on different types of instruments, such as notes,<sup>6</sup> deeds,<sup>7</sup> and insurance policies.<sup>8</sup>

Courts have found that a heightened standard of proof is required in the civil context where fraud is a concern, such as proving the existence and contents of a lost will or oral contract.<sup>9</sup>

Where the lost instrument is to be proved on a collateral issue rather than the main question in dispute, the degree of proof is somewhat less.<sup>10</sup>

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#### Footnotes

<sup>1</sup> [Archie Comic Publications, Inc. v. DeCarlo](#), 258 F. Supp. 2d 315 (S.D. N.Y. 2003), judgment entered, 2003 WL 21354692 (S.D. N.Y. 2003), [aff'd](#), 88 Fed. Appx. 468 (2d Cir. 2004) and [aff'd](#), 88 Fed. Appx. 468 (2d Cir. 2004) (applying New York law); [In re Estate of Rosso](#), 270 Neb. 323, 701 N.W.2d 355 (2005); [O'Brien v. Town of Huntington](#), 66 A.D.3d 160, 884 N.Y.S.2d 446 (2d Dep't 2009), leave to appeal dismissed, 14 N.Y.3d 935, 905 N.Y.S.2d 557, 931 N.E.2d 541 (2010); [A.G. Edwards & Sons, Inc. v. Beyer](#), 170 S.W.3d 684 (Tex. App. El Paso 2005), judgment [aff'd](#) in part, [rev'd](#) in part on other grounds, 235 S.W.3d 704 (Tex. 2007).

<sup>2</sup> [Crawford v. 733 San Mateo Co.](#), 854 F.2d 1220, 8 U.C.C. Rep. Serv. 2d 75 (10th Cir. 1988) (applying New Mexico law).

- <sup>3</sup> O'Brien v. Town of Huntington, 66 A.D.3d 160, 884 N.Y.S.2d 446 (2d Dep't 2009), leave to appeal dismissed, 14 N.Y.3d 935, 905 N.Y.S.2d 557, 931 N.E.2d 541 (2010).
- <sup>4</sup> Michalski v. Chicago Title & Trust Co., 50 Ill. App. 3d 335, 8 Ill. Dec. 416, 365 N.E.2d 654 (1st Dist. 1977).
- <sup>5</sup> Banks v. Mitsubishi Motors Credit of America, Inc., 435 F.3d 538 (5th Cir., 2005) (applying Mississippi law); Southern Union Co. v. Liberty Mut. Ins. Co., 581 F. Supp. 2d 120 (D. Mass. 2008) (applying Massachusetts law).
- <sup>6</sup> § 36.
- <sup>7</sup> § 37.
- <sup>8</sup> § 38.
- <sup>9</sup> Servants of Paraclete, Inc. v. Great American Ins. Co., 857 F. Supp. 822 (D.N.M. 1994), amended on other grounds on reconsideration in part, 866 F. Supp. 1560 (D.N.M. 1994) (applying New Mexico law).
- <sup>10</sup> Stump v. Harold, 125 W. Va. 254, 23 S.E.2d 656 (1942).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 36

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### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

### III. Enforcement of Lost or Destroyed Instruments


#### B. Evidence and Proof

#### 2. Burden and Standard of Proof

## § 36. Notes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  23

#### Forms

[Am. Jur. Legal Forms 2d § 169:7](#) (Affidavit of Loss—Promissory Note)

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments §§ 69, 70, 72](#) (Checklist and Complaint, Petition, or Declaration in Action on Lost or Destroyed Promissory Note)

The standard of proof required to enforce a lost promissory note may be that of clear and convincing evidence to establish ownership of the instrument, an explanation for absence or loss of the instrument, and the terms of the instrument,<sup>1</sup> but other jurisdictions require proof by only a preponderance of the evidence<sup>2</sup> or a lesser standard.<sup>3</sup>

In some jurisdictions, the payee of a lost note has the burden of proving nonpayment.<sup>4</sup>

#### Practice Tip:

If possession of a note at the time of its loss or destruction is not required for enforcement, proof of how the note was lost or destroyed is not required.<sup>5</sup>

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Footnotes

- <sup>1</sup> [Castellano v. Bitkower](#), 216 Neb. 806, 346 N.W.2d 249, 38 U.C.C. Rep. Serv. 561 (1984).  
As to enforcement of lost negotiable instruments, generally, see [Am. Jur. 2d, Bills and Notes §§ 279 to 287](#).
- <sup>2</sup> [In re Perrysburg Marketplace Co.](#), 208 B.R. 148, 34 U.C.C. Rep. Serv. 2d 732 (Bankr. N.D. Ohio 1997) (applying Ohio law).
- <sup>3</sup> [Martin v. Jesse French Piano & Organ Co.](#), 151 Ala. 289, 44 So. 112 (1907).
- <sup>4</sup> [Central Bank v. Bishop](#), 353 So. 2d 1109 (La. Ct. App. 2d Cir. 1977), writ denied, 355 So. 2d 549 (La. 1978).
- <sup>5</sup> [Deakter v. Menendez](#), 830 So. 2d 124, 49 U.C.C. Rep. Serv. 2d 849 (Fla. Dist. Ct. App. 3d Dist. 2002).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 37

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### Lost and Destroyed Instruments

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### III. Enforcement of Lost or Destroyed Instruments


#### B. Evidence and Proof

##### 2. Burden and Standard of Proof

## § 37. Deeds

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  23

A party seeking to prove a lost or destroyed deed carries a high burden in setting forth the description of the property, the nature and extent of his or her interest therein, a description of his or her evidence of title, the date and contents of that evidence of title, and the name of the person who executed it.<sup>1</sup> The party claiming title to property based on an alleged lost deed has the burden of proving both the existence and delivery of the deed,<sup>2</sup> and proof must be more than a mere preponderance of the evidence. In order to reestablish a deed, proof of the operative parts of the lost or destroyed document must be clear, strong and unequivocal,<sup>3</sup> or clear and certain.<sup>4</sup>

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#### Footnotes

<sup>1</sup> [Oberkramer v. Brown](#), 635 S.W.2d 63 (Mo. Ct. App. E.D. 1982).

<sup>2</sup> [Parker v. Barnes](#), 519 So. 2d 945 (Ala. 1988).

<sup>3</sup> [Perez v. Rivas](#), 36 So. 3d 896 (Fla. Dist. Ct. App. 4th Dist. 2010).

<sup>4</sup> [O'Brien v. Town of Huntington](#), 66 A.D.3d 160, 884 N.Y.S.2d 446 (2d Dep't 2009), leave to appeal dismissed, 14 N.Y.3d 935, 905 N.Y.S.2d 557, 931 N.E.2d 541 (2010).

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### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

#### III. Enforcement of Lost or Destroyed Instruments


##### B. Evidence and Proof

##### 2. Burden and Standard of Proof

### § 38. Insurance policies

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  23

#### Forms

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments § 71](#) (Complaint, Petition, or Declaration—Recovery on Fire Insurance Policy—Policy Destroyed in Fire)

While some jurisdictions impose a clear and convincing standard of proof to enforce a lost insurance policy, based on a finding that a heightened standard of proof is needed because lost insurance instruments are a common problem,<sup>1</sup> it is widely held that only a preponderance of the evidence is required,<sup>2</sup> absent a strong likelihood of fraud or wrongdoing.<sup>3</sup>

#### Comment:

The rationale for the more liberal preponderance standard is based on the view that insurance policies are not highly vulnerable to fraud, given that the documents used to prove the existence and contents of lost or missing insurance policies are inherently more reliable than the majority of papers offered into evidence.<sup>4</sup>

Regardless of the standard of proof required, the insured has the initial burden of bringing the claim within the coverage of



the missing policies.<sup>5</sup> That requires proving the existence and terms of the alleged lost insurance policy,<sup>6</sup> establishing both the issuance and terms of the policy, including the named insured, the period of coverage, the types of coverage, and the limits of coverage.<sup>7</sup> A party relying on the terms of a missing insurance policy must first certify to the court that it has made a diligent and unsuccessful search for the policy.<sup>8</sup>

Once a claiming party has carried its burden of proof to establish the existence and contents of an insurance policy, the burden shifts to the opposing party that asserts a lack of insurance coverage, usually the insurer, to disprove coverage, or to prove applicable exclusions, exceptions, or exemptions to coverage.<sup>9</sup> The insurer is generally in the best position to produce evidence as to coverage limitations and must bear the burden to do so.<sup>10</sup>

**Practice Tip:**

In an action to recover on a lost insurance policy, the burden of proof issue is procedural, and is thus governed by the law of the forum state.<sup>11</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Insured proved that missing comprehensive general liability (CGL) policies during early 1960s had same material terms and conditions as bookend policies before and after period of missing policies, and insured thus proved material terms and conditions of the policies; insurer failed to offer any evidence to rebut, undercut, or discount insured's evidence of same coverage and endorsements as bookend and specimen policies, insurer failed to show materiality of differences between specimen and bookend policies as to premium and coverage endorsements, renewal number on one bookend policy supported reasonable inference that it contained same terms and conditions as previous policy, and nothing indicated insurer's intent to change policy terms during period of missing policies. [Travelers Indemnity Company v. Rogers Cartage Company](#), 2017 IL App (1st) 160780, 420 Ill. Dec. 907, 98 N.E.3d 524 (App. Ct. 1st Dist. 2017).

### [END OF SUPPLEMENT]

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### Footnotes

<sup>1</sup> [Boyce Thompson Institute for Plant Research, Inc. v. Insurance Co. of North America](#), 751 F. Supp. 1137 (S.D. N.Y. 1990) (applying New York law).

<sup>2</sup> [Southern Union Co. v. Liberty Mut. Ins. Co.](#), 581 F. Supp. 2d 120 (D. Mass. 2008) (applying Massachusetts law); [Central Illinois Light Co. v. Home Ins. Co.](#), 342 Ill. App. 3d 940, 277 Ill. Dec. 45, 795 N.E.2d 412 (3d Dist. 2003), judgment *aff'd*, 213 Ill. 2d 141, 290 Ill. Dec. 155, 821 N.E.2d 206 (2004); [PSI Energy, Inc. v. Home Ins. Co.](#), 801 N.E.2d 705 (Ind. Ct. App. 2004).

<sup>3</sup> [Rubenstein v. Royal Ins. Co. of America](#), 44 Mass. App. Ct. 842, 694 N.E.2d 381 (1998), *aff'd in part*, 429 Mass. 355, 708 N.E.2d 639 (1999).

- <sup>4</sup> Remington Arms Co. v. Liberty Mut. Ins. Co., 810 F. Supp. 1420, 37 Fed. R. Evid. Serv. 975 (D. Del. 1992) (applying Delaware law).
- <sup>5</sup> Burt Rigid Box, Inc. v. Travelers Property Cas. Corp., 302 F.3d 83, 59 Fed. R. Evid. Serv. 936 (2d Cir. 2002) (applying New York law); Chickasha Cotton Oil Co. v. Houston Gen. Ins. Co., 2002 WL 1792467 (Tex. App. Dallas 2002).
- <sup>6</sup> Southern Union Co. v. Liberty Mut. Ins. Co., 581 F. Supp. 2d 120 (D. Mass. 2008) (applying Massachusetts law); PSI Energy, Inc. v. Home Ins. Co., 801 N.E.2d 705 (Ind. Ct. App. 2004).
- <sup>7</sup> Century Indem. Co. v. Aero-Motive Co., 254 F. Supp. 2d 670 (W.D. Mich. 2003) (applying Michigan law).
- <sup>8</sup> Metlife Capital Corp. v. Westchester Fire Ins. Co., 224 F. Supp. 2d 374 (D.P.R. 2002) (applying Puerto Rico law).
- <sup>9</sup> Hoerner v. ANCO Insulations, Inc., 812 So. 2d 45 (La. Ct. App. 4th Cir. 2002), writ denied, 819 So. 2d 1023 (La. 2002) and writ denied, 819 So. 2d 1023 (La. 2002) and writ denied, 819 So. 2d 1023 (La. 2002) and writ denied, 819 So. 2d 1024 (La. 2002).  
In lost insurance cases, the burden of establishing applicable exclusions is upon the insurer. *Century Indem. Co. v. Aero-Motive Co.*, 254 F. Supp. 2d 670 (W.D. Mich. 2003) (applying Michigan law).
- <sup>10</sup> American Home Assur. Co. v. Junger, 982 So. 2d 90 (Fla. Dist. Ct. App. 3d Dist. 2008).
- <sup>11</sup> Gold Fields American Corp. v. Aetna Cas. and Sur. Co., 173 Misc. 2d 901, 661 N.Y.S.2d 948 (Sup 1997).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 39

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### Lost and Destroyed Instruments

Lonnie E. Griffith, Jr., J.D.

### III. Enforcement of Lost or Destroyed Instruments


#### B. Evidence and Proof

#### 3. Weight and Sufficiency of Evidence

## § 39. Contracts and agreements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

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Clear, strong, and unequivocal parol or extrinsic evidence may be required to establish proof of a lost contract's contents before permitting a party to avoid the requirements set forth in the statute of frauds.<sup>1</sup>

Sufficient evidence to sustain enforcement of a lost agreement has been found in cases involving an agreement to remove signs,<sup>2</sup> a letter renouncing a promissory note,<sup>3</sup> a premarital agreement,<sup>4</sup> a split-trust agreement,<sup>5</sup> and a debt assumption agreement.<sup>6</sup> Persuasive evidence, where supported by other testimony, has included the original proposed version of a lost agreement,<sup>7</sup> a letter mentioning the content of the lost letter-agreement being contested and acknowledging its receipt,<sup>8</sup> comparable agreements drafted by the same attorney for related parties,<sup>9</sup> the testimony of an attorney and secretary who prepared the lost original document that they saw the executed original,<sup>10</sup> and retained, unsigned copies of the lost instrument, supported by receipt of the alleged consideration for the agreement.<sup>11</sup>

Evidence was insufficient to establish a lost "rent-to-own" contract for the purchase of a home, based solely on the plaintiff's testimony and a bag of ashes, in the face of evidence that the deceased owner had declared payments as rental income on tax returns for the entire period of time the alleged purchasers occupied the house.<sup>12</sup>

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### Footnotes

<sup>1</sup> [Zander v. Ogihara Corp.](#), 213 Mich. App. 438, 540 N.W.2d 702 (1995).

<sup>2</sup> [American Sav. and Loan Ass'n of Florida v. Atlantic Inv. Corp.](#), 436 So. 2d 442 (Fla. Dist. Ct. App. 4th Dist. 1983).

<sup>3</sup> [In re Marriage of Fifield](#), 776 P.2d 1167 (Colo. App. 1989).

- 4 Jurek v. Couch-Jurek, 296 S.W.3d 864 (Tex. App. El Paso 2009).
- 5 Penny v. Wilson, 123 Cal. App. 4th 596, 20 Cal. Rptr. 3d 212 (2d Dist. 2004).
- 6 Farmers Co-op. Ass'n v. Cooper, 720 N.W.2d 192 (Iowa Ct. App. 2006).
- 7 American Sav. and Loan Ass'n of Florida v. Atlantic Inv. Corp., 436 So. 2d 442 (Fla. Dist. Ct. App. 4th Dist. 1983).
- 8 In re Marriage of Fifield, 776 P.2d 1167 (Colo. App. 1989).
- 9 Jurek v. Couch-Jurek, 296 S.W.3d 864 (Tex. App. El Paso 2009).
- 10 Penny v. Wilson, 123 Cal. App. 4th 596, 20 Cal. Rptr. 3d 212 (2d Dist. 2004).
- 11 Farmers Co-op. Ass'n v. Cooper, 720 N.W.2d 192 (Iowa Ct. App. 2006).
- 12 Drew v. Walkup, 240 Neb. 946, 486 N.W.2d 187 (1992).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 40

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### Lost and Destroyed Instruments

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### III. Enforcement of Lost or Destroyed Instruments


#### B. Evidence and Proof

#### 3. Weight and Sufficiency of Evidence

## § 40. Notes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  23

### Forms

[Am. Jur. Legal Forms 2d § 169:7](#) (Affidavit of Loss—Promissory Note)

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments §§ 69, 70, 72](#) (Checklist and Complaint, Petition, or Declaration in Action on Lost or Destroyed Promissory Note)

The sufficiency of proof of the loss of a note sued upon in an action by the owner of a lost instrument is a question largely within the discretion of the trial court,<sup>1</sup> and depends upon the circumstances,<sup>2</sup> but the trial court's findings are not conclusive in the face of clear error.<sup>3</sup> The importance of the instrument affects the quantum of evidence required to prove the former existence and contents of a lost instrument: the greater its value the more conclusive should be the evidence.<sup>4</sup>

In some jurisdictions, lost-note affidavits are commonly used to prove the terms of an underlying debt but they are rarely enough by themselves to prove ownership of a debt.<sup>5</sup>

### Caution:

A trial court erred in ruling that a creditor could not prove the loss of a note he was seeking to enforce, where the creditor swore under oath that he did not assign or transfer the note and that the original was lost or destroyed. The debtor presented no evidence to the contrary.<sup>6</sup>

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Footnotes

- <sup>1</sup> [Barber v. Ehrich](#), 394 So. 2d 220, 31 U.C.C. Rep. Serv. 1038 (Fla. Dist. Ct. App. 5th Dist. 1981).  
As enforcement of lost negotiable instruments, generally, see [Am. Jur. 2d, Bills and Notes §§ 279 to 287](#).
- <sup>2</sup> [Keil v. Wilson](#), 47 N.M. 43, 133 P.2d 705, 148 A.L.R. 397 (1942).
- <sup>3</sup> [Deakter v. Menendez](#), 830 So. 2d 124, 49 U.C.C. Rep. Serv. 2d 849 (Fla. Dist. Ct. App. 3d Dist. 2002).
- <sup>4</sup> [Telluric Co. v. Bramer](#), 76 W. Va. 185, 85 S.E. 177 (1915).
- <sup>5</sup> [Cogswell v. CitiFinancial Mortg. Co., Inc.](#), 624 F.3d 395 (7th Cir. 2010) (applying Illinois law).
- <sup>6</sup> [Deakter v. Menendez](#), 830 So. 2d 124, 49 U.C.C. Rep. Serv. 2d 849 (Fla. Dist. Ct. App. 3d Dist. 2002).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 41

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### Lost and Destroyed Instruments

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### III. Enforcement of Lost or Destroyed Instruments


#### B. Evidence and Proof

#### 3. Weight and Sufficiency of Evidence

## § 41. Deeds

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  23

Where the lost instrument constitutes a muniment of title to real estate, a higher degree of proof is required with respect to the former existence and contents of the instrument than with respect to other instruments.<sup>1</sup> Nonetheless, a missing deed will only fail if, after resorting to oral proof or after relying upon other extrinsic or external proof or evidence, that which was intended by the instrument remains mere matter of conjecture.<sup>2</sup>

Convincing evidence was found from the conduct of parties treating land as their own and paying taxes on it, absent a contrary claim or act by sellers and the omission of the land from probate after the sellers' deaths.<sup>3</sup> Similarly, evidence was sufficient where it included testimony as to the execution and the delivery of the deed to the grantee, supported by the testimony of various witnesses who had seen the deed, and the long exclusive possession of the land and the payment of taxes by the grantee.<sup>4</sup> In contrast, evidence was insufficient to establish a lost deed where the plaintiffs offered conflicting testimony as to who previously owned the house, one plaintiff admitted total ignorance concerning real estate terminology, and one plaintiff admitted having no idea what agreements others may have entered.<sup>5</sup>

Creditors failed to prove a particular balance due on a lost mortgage note where no mortgage was filed or found, and no notary or attorney appeared who could testify that either a mortgage or the note was perfected.<sup>6</sup>

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### Footnotes

<sup>1</sup> [Roysdon v. Terry](#), 4 Tenn. App. 638, 1927 WL 2096 (1927).

<sup>2</sup> [Illig v. U.S.](#), 58 Fed. Cl. 619 (2003) (applying Missouri law).

<sup>3</sup> [Brooks v. Toperzer](#), 122 N.H. 139, 441 A.2d 1177 (1982).

<sup>4</sup> Young v. Young, 267 Ark. 967, 593 S.W.2d 72 (Ct. App. 1980).

<sup>5</sup> Perez v. Rivas, 36 So. 3d 896 (Fla. Dist. Ct. App. 4th Dist. 2010).

<sup>6</sup> Financial Corp. v. Estate of Cooley, 447 So. 2d 594 (La. Ct. App. 3d Cir. 1984).

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## 52 Am. Jur. 2d Lost and Destroyed Instruments § 42

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### Lost and Destroyed Instruments

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#### III. Enforcement of Lost or Destroyed Instruments


##### B. Evidence and Proof

##### 3. Weight and Sufficiency of Evidence

### § 42. Insurance policies

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Lost Instruments](#)  23

#### Forms

[Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments § 71](#) (Complaint, Petition, or Declaration—Recovery on Fire Insurance Policy—Policy Destroyed in Fire)

Secondary evidence of an allegedly lost insurance policy, to be sufficient, must show the policy terms and not just the existence of the policy.<sup>1</sup> Sufficient proof of the coverage provided by destroyed or lost policies of insurance can be provided through the use of circumstantial evidence such as payment records, renewal letters, miscellaneous correspondence, or prior claims files.<sup>2</sup> Testimony regarding a regular business practice can be sufficient to establish the existence and content of missing policy documents,<sup>3</sup> and routine business records can suffice,<sup>4</sup> including copies of comparable or predecessor policies,<sup>5</sup> or insurance certificates.<sup>6</sup> The absence of a contemporaneous policy establishing the norms of coverage may be fatal to the plaintiff's case.<sup>7</sup> Verbatim proof of a policy's content is not required where evidence shows the substance, but not the precise or actual language.<sup>8</sup>

#### Practice Tip:

A putative insured may create a trial-worthy dispute of fact by introducing evidence that standard policy forms or specimen forms reasonably supply the terms of an allegedly lost policy.<sup>9</sup>

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Footnotes

- <sup>1</sup> Klopman v. Zurich American Ins. Co. of Illinois, 233 Fed. Appx. 256 (4th Cir. 2007) (applying Maryland law); Glew v. Cigna Group Ins., 590 F. Supp. 2d 395 (E.D. N.Y. 2008) (applying New York law).
- <sup>2</sup> Sharonville v. Am. Employers Ins. Co., 109 Ohio St. 3d 186, 2006-Ohio-2180, 846 N.E.2d 833 (2006).
- <sup>3</sup> Paul Revere Variable Annuity Ins. Co. v. Zang, 248 F.3d 1 (1st Cir. 2001) (applying Massachusetts law); Burt Rigid Box, Inc. v. Travelers Property Cas. Corp., 302 F.3d 83, 59 Fed. R. Evid. Serv. 936 (2d Cir. 2002) (applying New York law).
- <sup>4</sup> Southern Union Co. v. Liberty Mut. Ins. Co., 581 F. Supp. 2d 120 (D. Mass. 2008) (applying Massachusetts law); ACMAT Corp. v. Greater New York Mut. Ins. Co., 88 Conn. App. 471, 869 A.2d 1254 (2005).
- <sup>5</sup> Boston Gas Co. v. Century Indem. Co., 529 F.3d 8 (1st Cir. 2008), *certified question answered*, 454 Mass. 337, 910 N.E.2d 290 (2009) (applying Massachusetts law); ACMAT Corp. v. Greater New York Mut. Ins. Co., 88 Conn. App. 471, 869 A.2d 1254 (2005).
- <sup>6</sup> ACMAT Corp. v. Greater New York Mut. Ins. Co., 88 Conn. App. 471, 869 A.2d 1254 (2005).
- <sup>7</sup> Klopman v. Zurich American Ins. Co. of Illinois, 233 Fed. Appx. 256 (4th Cir. 2007) (applying Maryland law).
- <sup>8</sup> Dart Industries, Inc. v. Commercial Union Ins. Co., 28 Cal. 4th 1059, 124 Cal. Rptr. 2d 142, 52 P.3d 79 (2002).
- <sup>9</sup> Southern Union Co. v. Liberty Mut. Ins. Co., 581 F. Supp. 2d 120 (D. Mass. 2008) (applying Massachusetts law).

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